MICHIGAN SUPREME COURT

PUBLIC HEARING
September 2, 2009

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**CHIEF JUSTICE KELLY:** Good morning ladies and gentlemen. We are happy to be here with you today. We have several different agendas and the first is the public hearing on administrative changes that have been submitted to public comment, written comment, and at this point these six items are before us for public comment. So we are eager to hear public comment on them. The first is - Item #1 is 2005-32 involving amendment of Rules 2.112, 113, 3.101, and 8.119. And we have Judge William Richards here. Judge Richards.

**ITEM 1: 2005-32 - MCR 2.112 etc.**

**JUDGE RICHARDS:** Good morning your honors.

**CHIEF JUSTICE KELLY:** Good morning.

**JUDGE RICHARDS:** May it please the Court. It's good to see you all again. I am pleased to report that as part of this Court's decision back in April to publish the proposed rules for comment that we have done substantial work in retooling the proposed rules ourselves. In conjunction and cooperation with leaders from the Michigan Creditors Bar Association including Mr. Michael Buckles whom I'm pleased to say is here in the courtroom today, and other leaders from the Creditors Bar substantial work by our court we have tried to retool the proposed rules to meet all the documented concerns of the various stakeholders. And I am pleased to report that we have reached 98 to 99% agreement with the Creditors Bar on all the language of the rule with the exception of the second paragraph of 2. – I'm sorry – 8.119, the – where we tried to address the statute of limitations issues. But with respect to the rest of the proposed rules we have reached complete agreement with the Creditors Bar, and we are starting to receive favorable comments from other key interest groups including just yesterday we received a supportive letter from UAW Legal Services. I must tell you that trying to draft the court rule that meets all the concerns of both sides of the fence makes me feel like I'm the new senate majority leader because as soon as one moves in one direction to try to please one stakeholder one risks losing the support of another stakeholder. Indeed, the UAW supportive comments yesterday did comment on how our proposals seem to be watered down in certain ways, but of course that's as a result of trying to deliberately soften some of the language to meet legitimate concerns from other stakeholders and this Court. For example, we have taken out the rather strong language that would have permitted local court – district courts – to reject papers filed with the court, and we have taken out the

language that the court found troublesome about local court rules and chief judges authorizing local rules because that would have lead to troublesome inconsistency among district courts. We think it better, and our stakeholders think it better, to have a published statewide rule. And so our new rule – its main features are really twofold. One is that it would require additional information in consumer debt cases, and we've heard no objection to that proposed rule to require additional information in consumer debt cases. And, indeed, the better creditors' attorneys are already doing that without a court rule.

**JUSTICE MARKMAN:** Mr. Richards?

**JUDGE RICHARDS:** Yes, Justice Markman.

**JUSTICE MARKMAN:** When you were last before the Court I asked you a question that related to a concern of mine which was specifically that the 46th District Court was not necessarily representative of courts around the state, and that public policy in this area as a result shouldn't entirely be a function of what the preferences of the 46th District Court were. Specifically, I asked whether or not you had any information at that time concerning the number of filings in your district on a proportionate basis compared to those in other districts around the state. You didn't have that information at that time. Would you by any chance have that information now because I'm still concerned that the 46th District, although I very much respect the judges on that district including yourself, and I see Judge Moiseev here, I question whether or not it's a representative district in all respects on the basis of which public policy throughout the state should be made. You talk about all the stakeholders being involved, but I wonder whether or not the interest of the circuit judge in Alpena, or the district judge in Marquette, or the clerk in Cadillac, have all been taken into consideration in this process, and they seem to me very much to be stakeholders as well.

**JUDGE RICHARDS:** They are indeed, and I can answer your question in the following ways. Number one, we have done a survey which is attached to our comments which demonstrates that the way that we – our district court clerks process papers filed with the court is within the mainstream of how other district courts process their papers. Our survey indicates that the vast majority of other district courts do return flawed papers to the litigant for correction. And, in general, those corrections are promptly made and then the paper is processed by the district court. The reason – Number two, the reason we have consulted so extensively with the Michigan Creditors Bar Association is that we know that their practitioners practice statewide. And so they are the ones that we rely on to inform us about other courts' practices, and that's why we want to come up with a rule that accommodates their legitimate concerns and other stakeholders like UAW Legal Services because those lawyers do have multi-district practices. So in that respect yes. I think that our court is representative and our survey so demonstrates.

**JUSTICE MARKMAN:** What accounts for the opposition of the Michigan Judges Association?

**JUDGE RICHARDS:** The Michigan Judges Association has not yet weighed in on our alternate proposal. I did speak yesterday to Judge Geralski (phonetic) who is the head of their rules committee and who partially authored the letter that is on file in – somewhat in opposition to our earlier proposal. I invited his attention and his association's attention to our alternate proposal, and in talking with him extensively yesterday I learned that their principal objection to the old rule was the perception that it would require substantial additional training for court clerks. Now as I told him I think that's a substantial misread of not only our earlier proposal but our present one. We are not intending that district court clerks go through extensive training on – you know go to night school law classes or something like that –

**JUSTICE YOUNG:** But some additional training is going to be required in courts that are not as intensively involved in this area of practice so they can consistently review and return, and as your alternative says, return nonconforming papers. I think most of the time what clerks do in the trial courts is fairly routine.

**JUDGE RICHARDS:** Yes, it is.

**JUSTICE YOUNG:** This requires analysis.

**JUDGE RICHARDS:** Of what?

**JUSTICE YOUNG:** A paper subject to the rule—whether it is conforming.

**JUDGE RICHARDS:** We're not asking the clerks to take on any additional analysis beyond what they already do, and I believe that our survey substantiates the fact that clerks already analyze the papers that the court rule would give them responsibility of reviewing. For example – and exercising ministerial judgment with respect to those papers. For example, if a complaint is filed along with the summons, what the summons – the name of one of the parties on the summons does not match the name of the party on the complaint, that's a ministerial judgment. I don't think that requires much training to realize that that's a mistake and the plaintiff needs to correct it. Or following that case down the line, if the complaint and summons is fine and the summons is issued, the next step in the case processing is service of process on the defendant. If that proof of service comes in and the name of the person served does not match the defendant's name on the complaint and summons, there's been another mistake made. I don't think that requires any training of a clerk to realize that that discrepancy is a problem and needs to be corrected. So I would respectfully disagree that any kind of significant additional training needs to be done to upgrade the skills of clerks. They're simply taking their

present experience and in some cases a simple calculator to determine whether there are mistakes—glaring mistakes—on the paper submitted and returning them if they are.

**JUSTICE YOUNG:** Are you aware of the suggestion by the Trial Court Services section of SCAO that a workgroup be convened to consider further MCR 8.119?

**JUDGE RICHARDS:** No, I'm not aware of that suggestion. Is that in writing someplace?

**JUSTICE CORRIGAN:** It's an internal report; that's why you wouldn't be aware of it.

**JUDGE RICHARDS:** No, I'm not aware of that.

**JUSTICE CORRIGAN:** I would like to thank you very much for the work you've done and commend you for the work that you've done.

**JUDGE RICHARDS:** You're so welcome.

**JUSTICE CORRIGAN:** I appreciate your approach and your attitude in taking on the extra burden that you have. And I would say with regard to the first two rules that you've satisfied my concern. I'm still concerned about 8.119 –

**JUDGE RICHARDS:** And what are your concerns there Justice Corrigan?

**JUSTICE CORRIGAN:** My concerns relate to the delegation problem and whether we've sufficiently detailed what clerks may and may not do. If a clerk's responsibility is to determine compliance with statutes, that seems to me what a judge does. So I still have some issues with regard to that.

**JUDGE RICHARDS:** Well, that's a somewhat overbroad statement in my view of what a clerk is supposed to be doing –

**JUSTICE CORRIGAN:** Right.

**JUDGE RICHARDS:** and we've tried to make it clear in the rule with this judicial review—informal judicial review provision that the Creditors Bar came up with and that we agreed to—we've tried to make it clear that clerks only make preliminary factual decisions. They're not taking a law book and examining a complaint, or examining a brief, or a motion, to determine whether it properly meets legal requirements. They are literally sometimes just taking out a calculator and not exercising legal judgments, but exercising their right index finger in catching glaring mistakes on things like garnishments. And they know through experience – Our clerk who handles

garnishments handles 30 to 50 per day. Well, if you handle that many things a day you get pretty good at it and you know what mainstream figures are and what figures are out of the mainstream. And you know that the typical amount of costs for a garnishment is probably under $100. So when you see one coming in claiming $2,500 in costs it doesn't take additional training, or legal training, or adjudicated decision making ability to say oops, that's a mistake; it's probably a typo or something. So we send it back, the plaintiff corrects it, and it sails through fine the second time. As far as delegation of authority, if you stop to think about it I think judges delegate a lot of authority without thinking of it as delegation. I certainly delegate my responsibility to draft opinions to our court's law clerk or research attorney. I imagine the Justices on this Court delegate some of that responsibility to their law clerks.

**JUSTICE CORRIGAN:** It isn't delegation without having that you know fishing line drawn back in because I'm reviewing what is out there –

**JUDGE RICHARDS:** That's right.

**JUSTICE CORRIGAN:** so it is a judicial decision –

**JUDGE RICHARDS:** Exactly, because the final decision is always yours, correct?

**JUSTICE CORRIGAN:** So the delegation – you know the delegation out – I mean that – it isn't true delegation in that sense because there's oversight.

**JUDGE RICHARDS:** But we oversee our clerks; we're not delegating anything to outside entities. They work for us and are instructed by us.

**JUSTICE YOUNG:** But the judge does not review – you use the example of opinions. I take it you do not have your clerk write an opinion that you do not see and issue it.

**JUDGE RICHARDS:** Of course not.

**JUSTICE YOUNG:** All right. What you're proposing here is the clerk make what I think are arguably legal determinations which unless objected to the judge – no judge will see.

**JUDGE RICHARDS:** That's true, but I would not agree with you that these are legal decisions. These are –

**JUSTICE YOUNG:** I understand. That's a point of perhaps of difference (inaudible).

**JUDGE RICHARDS:** of difference, right.

**JUSTICE YOUNG:** But if they are arguably legal decisions that the clerk is making, no judge at least is obligated to review them before they are implemented.

**JUDGE RICHARDS:** But your honor, if you read our proposed rule, the procedure is so simple for the litigant who is caught in this situation. All he has to do – and he's informed right in the proposed court rule, that's the advantage of it. We take this practice that has been under the table, an advantage and benefit for litigants that in most courts has been there for decades, and we bring it to the surface to allow litigants to know that if they do have a paper returned by a clerk and they do believe as you have said that the clerk is inappropriately making a legal determination, they have a simple, informal, inexpensive option – it's placed right in the court rule – pick up the phone, call the clerk and say please have the judge review. I don't know how I can make it any simpler than we've made it.

**JUSTICE YOUNG:** I think this is a substantial improvement –

**JUDGE RICHARDS:** No filing fee, no motion fee, no hearing –

**JUSTICE YOUNG:** Please don't get me wrong. I think this is a very substantial improvement over what the proposal that was initially submitted, and I agree with Judge Corrigan – Justice Corrigan that the two prior proposals look fine. I'm still struggling for the same reason that Justice Corrigan is struggling with the – whether this is sufficiently narrow so that it isn't a delegation of judicial responsibility to a clerk.

**JUDGE RICHARDS:** I thought of one example of how we delegate substantial authority to outside entities which you may want to consider on this broader concern about delegation of judicial authority. Let's consider how trial court judges delegate settlement authority to case evaluators. These are private lawyers not even court staff, and under the auspices of the court rule for case evaluation we delegate our authority to convene settlement conferences to three private lawyers who sit in three lawyer case evaluation panels, and they have complete responsibility to evaluate a case, set a settlement value on it, totally outside the offices of the court – this goes on without our direct oversight – and their recommendation has teeth in it. There are potential sanctions for rejecting the case evaluator's settlement figure. If they say settle this case for $8,000 and one party rejects that figure, that party can be assessed costs and attorney fees. Frankly, when you think about it, that's more power than the judge has. I don't have the power to sanction a party for not accepting my settlement figure.

**CHIEF JUSTICE KELLY:** I too appreciate the work that's gone into refining this recommendation – this longstanding recommendation – Judge Richards. Would you

reassure me about one item. How – how can we know that parties will not find their actions barred by the statute of limitations should a clerk reject the papers handed in at the last minute?

**JUDGE RICHARDS:** Yes, that's a good point, and we've tried to address that concern which Justice Corrigan expressed in her dissent. And we do that in our alternate proposal in the second paragraph of 8.119(d). If a party believes that a clerk has erroneously returned a complaint, the only document that can toll the running of the statute of limitations, then a party can file a motion for judicial review and if the judge determines that the clerk erroneously returned that complaint, then the court rule says that the filing date is the filing date of the original complaint that the judge determines was erroneously returned. So that gives the plaintiff the advantage of the first filing date within the statute of limitations.

**CHIEF JUSTICE KELLY:** Are there other questions? If not, thank you Judge Richards.

**JUDGE RICHARDS:** Thank you so much for your consideration.

**CHIEF JUSTICE KELLY:** The next is Michael Buckles of the Michigan Creditors Bar Association. Good morning Mr. Buckles.

**MR. BUCKLES:** Good morning Chief Justice and members of the Supreme Court. My name is Michael H.R. Buckles; I'm the government affairs director for the Michigan Creditors Bar. First of all, thank you for giving me this opportunity to respond, and reviewing all the paperwork that we've submitted. Again, thank you to Judge Richards, Judge Moiseev, and the 46th District Court for including us in this dialog. We too have no problem with the first two court rules – 2.112 or 3.101 – we've signed off on those. We have the same concerns that the Court has raised, and I want to have a moment of opportunity to explain that. We don't agree with Judge Richards or the 46th District Court that this is merely a codification of a longstanding practice. This is a major change. This is an expansion of the clerk's power to do analysis and decision making on all papers filed in any court in this state. It is not limited to a calculator and calculating judgment and (inaudible) costs. It is making decisions as to whether or not any paper filed with the court conforms with statutes or with court rules. For that reason, we would – first of all, we agree with his decision making whether the appeal process – it simplifies it, it's make it much easier. However, what we're going to suggest is a bit of a compromise, and this is where we have a difference of opinion with Judge Richards and the Court. We would ask that since there is no clarification of exactly what a clerk can return, and when they can return it, or why they can return it, we want uniformity throughout the state – one court of justice. We would ask Chief Justice and members of the Court that this be a pilot project just for 8.119(c) and (d) for the 46th District Court and two or three other courts that would be interested in doing this. For that reason, we

could measure this over a year and see what documents are the ones that are the most important. What are the ones that are routinely returned? I'm gathering most of them are garnishments that need to be refined and taken care of. We can then create the court rule with specificity to have – to identify those documents that can be returned and why they can be returned. The court over the time we've discussed this has said well, there's just too many possibilities. Well I'm suggesting that that's not a fair answer to us. As members of the Bar, we need to have uniformity throughout the state. If we look at the way the rule is written before and the way it's written now, it still allows every chief judge and every judge within every court to set up some sort of guidelines, written or unwritten, that they tell their clerks of what can be returned and when. We will not have consistency in the state of Michigan. We will not have one court of justice throughout all the courts if we continue to have different opinions and different rulings in each court of what can be returned and why. And it's not just the pleadings that can be returned, it's a motion and so forth. And the other point on statute of limitations. Our wording that we wanted was that any nonconforming paper returned is considered filed on the original filing date. The reason we want this not just for a pleading, not just for a complaint and summons, because under the court rules, discovery for example, requests – or responses to requests for admissions, or under a pretrial order, when documents need to be filed, if those are returned to us, and – by the clerk, and we refile them later, we want them to be the original date we had it. Why? Because we want to be in compliance with the pretrial order, we sure don't want to have a request for admission returned and then find that we've admitted everything because we didn't file it within 28 days. For that reason, we say that any nonconforming paper that's returned is considered filed on the original filing date. So if it eventually is approved, either by resubmission to the clerk with additional documentation or by the judge, that it is that time-stamped date that they originally stamped it that that's the date we file it to avoid – Imagine brother or sister counsel saying ah ha, theirs was returned by the court and you didn't file your exhibit list in time and therefore you've not complied with the pretrial order. Now –

**JUSTICE CORRIGAN:** Mr. Buckles, a quick question. Did you consider the Court of Appeals practice on their defective filing letters that they do and reject it when you were crafting this rule? In other words, the Court of Appeals says you filed a defective pleading you have 21 days to correct it. If you don't correct it, this action will follow.

**MR. BUCKLES:** Right.

**JUSTICE CORRIGAN:** And then you're not in the business of the postage to return documents, the problem of returning documents, all the issues that there are. Did you look at that rule?

**MR. BUCKLES:** Yes.

**JUSTICE CORRIGAN:** And why do you not favor that rule?

**MR. BUCKLES:** Well, I don't necessarily not favor it, but I – we would agree with that's not a bad practice. But I don't have a problem with it being returned to us and having a letter that has a date on it and somebody's name, a contact person, and a phone number and describing the reasons why it's returned. We get plenty of papers now that, as Judge Richards knows, are never returned to us. They're just stuffed in a file, no they didn't comply. Or –

**JUSTICE CORRIGAN:** That's a huge problem, and I –

**MR. BUCKLES:** Or we get papers –

**JUSTICE CORRIGAN:** But it poses expenses to the courts to return all those documents.

**MR. BUCKLES:** It does and I'm very cognizant of that because we often get – we're now getting requests from clerks telling us that we have to give envelopes for everything and sometimes we do if it has to be returned to us. I'd consider some modification of that. But quite honestly, Judge Richards and us worked on this procedure for approving or not approving something going back to the judge and so forth without a filing fee – excuse me without a motion fee or a hearing, and I think that that should be the case regardless of whether it's the complaint under statute of limitations or any paper. What I'm asking for is this. Let's test this; let's see what happens. This is the court – And by the way, I don't think – I think 46 is unique. I think they have a very highly skilled – I've know Donna Beaudet for 30 years – they have an incredibly skilled staff. They're well trained. I deal with every court in the state, and there's plenty of them that aren't, and I share Judge Borchard's same concerns that some clerks aren't gonna know what to do or how to do it. I share the Court's concern that it really is – that it really is analysis. I don't think we can deny that. So why don't we test this.

**JUSTICE YOUNG:** Could I – maybe to further the point that you're making. It strikes me that Justice Markman's concern about the scope of this problem may be localized. In a slightly different way it strikes me that we are amending a rule that applies to the filing of all papers as you point out, not just complaints but motions and other things that are required to be filed with the court, and the problem originated, it seems to me, in the garnishment area.

**MR. BUCKLES:** Yep.

**JUSTICE YOUNG:** We're modifying a rule of applicability to every paper filed for what might be a very narrow problem. And I'm having difficulty understanding why

we should be modifying the general rule for filing papers for such a localized problem at least as has been identified thus far.

**MR. BUCKLES:** Well, can I – Can I address that one point? I don't really think it's localized. (Inaudible) to the 46th –

**JUSTICE YOUNG:** Localized to this area of law.

**MR. BUCKLES:** Oh, well, in that sense I think it's probably localized only in that – in collection law. We do many more garnishments – it's a volume business – but you could have the garnishment problem on any –

**JUSTICE YOUNG:** I'm not suggesting it's not – the garnishment questions that have arisen –

**MR. BUCKLES:** Right.

**JUSTICE YOUNG:** in this administrative file aren't present in other district courts or circuit courts, but I'm suggesting to you I have not heard anybody say we have a problem with the filing of complaints in negligence or other areas of law outside of collections and garnishment. But the rule applies to all law – all cases – not just to garnishment.

**MR. BUCKLES:** Exactly.

**JUSTICE YOUNG:** Have you – I mean have you heard anything that suggests that the nature of the problems that the 46th District Court is trying to repair extend beyond garnishments and collection matters?

**MR. BUCKLES:** In fairness I think they do to a certain extent your honor. They may apply on – certainly garnishments I think is the huge part of it because it – because of calculations. And the point Judge Richards made about the calculator we right on agree with that, that's why we agree with 3.101. We want to know if we made a mistake – that's fine. We want to correct that. However, there are – In all fairness, there are some mistakes in other pleadings and on other papers. One of those would be in the default judgment itself. Now we have worked – the Creditors Bar has worked with SCAO and 46th District Court and other courts to create a new judgment form to prevent some of these problems. So that's why I would suggest that maybe we do the test – or the pilot project so we could see what documents there really are. What are the key areas? What are the hot areas that we are – is it default judgments. Is it garnishments? And what else is there? Because if we make this rule apply to al papers in all courts, God knows what's gonna be returned and why it's gonna be returned. And I have concern about that. I have concern about the extension of the power and delegation to a clerk. But if we can clarify

– and I think this is to the benefit of the courts and the clerks – if you can clarify what it is they can return and why they can return it, let's say garnishments because of miscalculations or default judgments because it's not based upon a written instrument--although now we get into a definition of written instrument, and I was before this Court a year ago on trying to clarify that. So if your honor's question to me is is it beyond garnishments – it is, but I think it's small and it continues to reduce exponentially as you get beyond default judgments and garnishments themselves.

**JUSTICE MARKMAN:** Mr. Buckles? I'm also very concerned about the point that Justice Young has raised and the point that you've responded to concerning the scope of the problem. But I continue to be concerned about the scope of the solution, and I'm very reluctant to draw lessons and to fashion public policy for the entire state, from Marquette County, and Alpena County, and Wexford County, and the other 80 counties of this state, if the problem in the 46th District is considerably different from that around the rest of the state. And I'm talking about numbers of garnishments, I'm talking about trends in terms of consumer debt cases, I'm talking generally about the burdens imposed by this process upon courts. You indicated the 46th District was unique. I'm not sure exactly what you meant by that.

**MR. BUCKLES:** Well, could I explain it?

**JUSTICE MARKMAN:** Is this a representative district on the basis of which this Court can be confident that we can fashion public policy for the entire state?

**MR. BUCKLES:** Let me clarify this so there's no misunderstanding with this Court or the 46th court. I think they're unique in that they're highly skilled and highly trained and much more so than many of the other courts. I will give due credit to many including the Troy district court and some other courts – I don't want to disparage any, but there is a difference in the level of training and quite honestly the ethic and the determination to make sure things are correct. With regard to the volume of cases or the number of garnishments, I would suspect that the 46th District Court has a higher volume because of its location and the location of creditors in that area. However, with regard to the issue of miscalculation of judgment interest on garnishments or possibly some issue with the default judgment, I don't think that's unique to the 46th District Court. I think the 46th District Court has simply pinpointed a problem that other courts have that those clerks either because of lack of training or whatever – ethic or attitude don't see that, don't look into it, don't take the time to do it. So in that sense I don't think they're unique.

**JUSTICE MARKMAN:** I'm not aware that we've heard from any other courts or, indeed, I'm not aware that we've heard from any other judges concerning this problem.

**MR. BUCKLES:** Well –

**JUSTICE CORRIGAN:** We've heard from the district judges (inaudible).

**MR. BUCKLES:** The Michigan District Judges Association did issue a letter agreeing in spirit with this court rule.

**JUSTICE WEAVER:** Well, I think we have a letter from them supporting the amendment.

**JUSTICE YOUNG:** Supporting the concerns.

**MR. BUCKLES:** Did I answer your question? I think they're unique in their quality of their clerks. I think there's other courts that are higher qualified. I think they're somewhat unique in that and probably have a higher volume although I think 36th would have a higher volume. I don't think it's unique that there are problems with calculations and garnishments. I'm here to say on the record that calculating garnishments can be tricky. It's not easy to do because of Michigan's confounded judgment interest statute that we can – I won't go into why it's there, but because it exists. So there are – and it's just a matter of math. If we're only going to correct garnishments and return garnishments because of miscalculations, that's a different story. We would support something of that nature. But because of the breadth of the rule and the expansion of the rule and going – and giving really clerks judicial powers – even though they're subject to review – we have concerns about that. And would ask either this rule be narrowed, that we clarify exactly what it is they can return and why, or do we make a pilot project and examine this at the 46th District Court and maybe if there's other district courts who want to do it--two or three. I'm willing to spend the time to do that your honors. I'm willing to look at it and come back and work with Bill Richards in the 46th and the other courts to do that.

**CHIEF JUSTICE KELLY:** Are there other questions of Mr. Buckles? If not, thank you sir.

**MR. BUCKLES:** Thank you your honor.

**CHIEF JUSTICE KELLY:** The next item is 2008-13 which involves the Michigan Rules of Professional Conduct – Rule 1.15A. And Dawn Evans representing the State Bar of Michigan is here. Hello Ms. Evans.

**ITEM 2: 2008-13 - MRPC 1.15A**

**MS. EVANS:** Good morning Chief Justice, Justices. May it please the Court. My name is Dawn Evans; I'm the director of professional standards at the State Bar. One of my responsibilities is overseeing the Client Protection Fund Department which processes claims against the Fund. The Standing Committee on the Client Protection

Fund with input from the staffs of the Michigan Bar Foundation, the Attorney Discipline Board, and the Attorney Grievance Commission brought forth this proposal which was adapted from the ABA Model Rule and approved by the Representative Assembly in September of 2006. We also worked with representatives from banking and regulatory communities to assure that the proposed rule is understood and will operate smoothly. On behalf of the Bar I wish to thank the Court for the opportunity afforded the Bar to answer questions during this process. We hope that our responses have been helpful. I do not intend to review ground previously covered, although I would be happy to field any questions that remain. Instead, I wish to simply state that we believe this rule's adoption would provide significant help in identifying trust accounting proprieties at an early stage serving as a deterrent to mismanagement of client funds and providing an opportunity to educate lawyers about the appropriate management of trust accounts.

**JUSTICE YOUNG:** Ms. Evans?

**MS. EVANS:** Yes.

**JUSTICE YOUNG:** Yesterday we met with the Attorney Grievance Commission as a part of our sort of ongoing sort of relationship building with various of these organizations. And I think it's fair to say that while the Attorney Grievance Commission was supportive of the general concept, they were more – I should say agnostic about whether this was the cure to solve the problem. The impression I have, and my colleagues can share what their impression is, is the Bar has insufficiently involved the Commission in the formulation of this rule, and that they are not certain it's the best rule to accomplish its mission.

**MS. EVANS:** We have certainly from the outset of this project involved the staff of the Attorney Grievance Commission in the drafting of this –

**JUSTICE CORRIGAN:** But who would that have been Ms. Evans?

**MS. EVANS:** That would include Bob Agacinski –

**JUSTICE YOUNG:** He specifically said -

**JUSTICE CORRIGAN:** He says he attended one meeting.

**JUSTICE YOUNG:** He says he attended meetings but not really very much involved.

**MS. EVANS:** Well, in addition to attending a meeting, he has been sent every piece of writing and correspondence on the topic as it has proceeded through the process. I can't, of course, speak to –

**JUSTICE YOUNG:** I think he's the most agnostic of the people who spoke yesterday.

**MS. EVANS:** I agree with you about that. I believe that if you also heard from Cynthia Bullington that Cynthia is not at all agnostic about it.

**JUSTICE YOUNG:** Not on the – not on the premise that the rule is based, but I didn't hear anybody say yesterday this is the answer to solve the problem of early monitoring of attorney defalcation on the client accounts.

**MS. EVANS:** And I think that that's not an untrue statement because I don't think that there is one silver bullet that will resolve that issue, but I think in the absence of that what we do know from communicating with jurisdictions that have had this rule in place for a long period of time is that their experience has –

**JUSTICE YOUNG:** This rule?

**MS. EVANS:** A version of this rule which – a version of the ABA Model Rule – most of the jurisdictions that have this rule have the principles and some of them will look a whole lot more like what is being proposed here than others, but the principles of it are fairly consistent through the 39 states that now have it.

**JUSTICE YOUNG:** I don't think anybody thought that the principle of detecting early when a lawyer was beginning to misuse a client account was a bad idea. The question – the devil is always in the details. And the question I have always was is there sufficient – do we have data on how things are functioning in other jurisdictions who have a rule like the one you're proposing. And it's been a fairly data free proposal so far on that point. I guess what I'm suggesting, at least from my standpoint my colleagues may disagree, is it sounds to me like you need to talk more with the very agency which is going to be tasked with implementing this policy.

**JUSTICE CORRIGAN:** And at least two representatives – well, one who's on a bank board and the other one who's what – president of the Michigan Bankers had really – were very surprised by the rule and had serious concerns about how it was going to function and the cost entailed. And what – what was the involvement of the Bankers Association and the development of the rule?

**MS. EVANS:** We met –

**JUSTICE CORRIGAN:** Who was the representative of the Bankers and how often did they attend?

**MS. EVANS:** We met with – and I apologize I can't remember their names – but we met with representatives of the Michigan Bankers Association, the Michigan Association of Community Bankers, and the Office of Financial and Insurance Regulation. And this, of course, now has been at least two years ago.

**JUSTICE CORRIGAN:** How – what's your estimate of the increased workload on the Attorney Grievance Commission as a consequence of this rule?

**MS. EVANS:** Based upon –

**JUSTICE CORRIGAN:** Do you know?

**MS. EVANS:** Based upon what we know from other jurisdictions' experience that are comparable in size, it appears that it could result in about 200 or so referrals a year. That works out to maybe –

**JUSTICE CORRIGAN:** Referrals versus there's a duty when every single attorney under the rule to immediately write to the Attorney Grievance Commission in the event of any overdraft notification. We heard from Mr. Agacinski yesterday that they anticipate in the neighborhood of 700 which would be – I think the workload of the AGC is around 3,000 to 4,000 complaints, so that's a significant increase in their workload is it not?

**MS. EVANS:** It would be if that – if that bears out. It would be if that bears out.

**JUSTICE CORRIGAN:** All right. Well, how did you arrive at 200?

**MS. EVANS:** Well, what we've done and I am certainly prepared to supplement the material after the hearing today with more precise information, but –

**JUSTICE YOUNG:** Maybe it would be nice to coordinate with Mr. Agacinski and his Commission first so that you're both on the same page.

**MS. EVANS:** Certainly.

**JUSTICE YOUNG:** All right? It is troubling to have the Bar here saying do this rule and the Commission who would be responsible for it saying principles okay, but we're not sure about this rule.

**CHIEF JUSTICE KELLY:** Well, strictly speaking the Commission hasn't taken a position.

**JUSTICE YOUNG:** No –

**CHIEF JUSTICE KELLY:** And we did hear from at least one Commission member who generally supported it.

**JUSTICE CORRIGAN:** Strongly supported the rule or the principle?

**CHIEF JUSTICE KELLY:** Certainly the principle and he didn't oppose the –

**JUSTICE YOUNG:** I heard no one oppose the principle.

**CHIEF JUSTICE KELLY:** So, I think these points are well taken. However, I'm interested in knowing what you're experience – or what your research has indicated has been the experience of the other – is it 39 states?

**MS. EVANS:** 39 states and actually Mexico has – will be the 40th. I think their effective date is maybe January 1. But there will soon be 40 states that have this rule.

**CHIEF JUSTICE KELLY:** Do you know whether there's been a large increase or an increase – sizable increase - in the number of complaints to state grievance commissions as a result of imposition of this rule in other states?

**MS. EVANS:** Of course, to some extent it depends on how you're using the term complaint because remember what this really does initially is simply trigger that a notice goes from –

**CHIEF JUSTICE KELLY:** Grievance – grievance strictly speaking is what I'm talking about.

**MS. EVANS:** Correct, correct. And what I understand and this is – I'm gonna say anecdotal like – haven't prepared an Excel sheet on it to this point in time but – but what we understand is that it typically results in – depending upon and relative to the size – I'm gonna say in the ballpark of about 200 a year that are the notices. The percentage of those that actually turn into investigations is quite small. New Jersey, for example, I did bring just a little bit. New Jersey –

**JUSTICE CORRIGAN:** How many lawyers are in New Jersey?

**MS. EVANS:** New Jersey's lawyer population I believe is 40% more than Michigan, and the 200 or so that they had annually resulted in 5 disbarments on trust account violations. So the return –

**JUSTICE CORRIGAN:** How many complaints? Because every single piece of paper has to be processed by someone.

**MS. EVANS:** Correct.

**JUSTICE CORRIGAN:** And under our rule a lawyer who gets one is separately obligated to explain immediately to the Commission.

**MS. EVANS:** That's correct.

**JUSTICE CORRIGAN:** Is that how other rules operate – immediate response by the lawyer who gets an overdraft notice?

**MS. EVANS:** Well, the language in the proposed rule gives them 21 days from receipt of their notice in which to respond. And, again, what we know from other jurisdictions' experience with this is that in the large majority of cases it gets sorted out as a bookkeeping error, as some sort of thing that was not intentional theft. The important point though I think is that these same jurisdictions say that they also have experience in situations where the only thing that triggers finding out that a lawyer has stolen funds are these very same notices. That's logical if you think about it if it's a circumstance where what a lawyer's actually done for example is forged the client's name, deposited it, and then written checks off of it. The client won't know because the client won't have even received notice of the – so even if the number is small, I still think that it's a very significant –

**JUSTICE YOUNG:** I'm very persuaded that this is the canary in the mine for lawyers who are raiding the trust accounts of their clients. I – the question is, again, how do you do this with least – with most efficacy so that – because every time the banks, assuming they want to do this, send out a notice of an overdraft, somebody at the Commission has to note it, somebody has to send the letter to the lawyer, and then has to evaluate the lawyer's response to the notice from the Commission. So there is a –

**MS. EVANS:** That's true.

**JUSTICE YOUNG:** There is a – even if it never results in a prosecution for unethical behavior there is still a process that these letters of overdraft from the bank will generate both in the Commission and among lawyers. That is where I think the Bar needs to talk more with the Commission so at least the – Mr. Agacinski and the Commissioners feel more comfortable that what you're proposing makes sense.

**CHIEF JUSTICE KELLY:** I had one further question and that is this. Are you aware of any incidents in these other 39 states where a banking institution has withdrawn its support or its use – its policy – changed its policy with regard to IOLTA monies – making them not available in that bank?

**MS. EVANS:** No. Our – what – in sending out – what I did – I'm a member of the National Organization of Bar Counsel and several months ago I sent out several questions to the other jurisdictions about their experiences with the banks, and there was not anyone who communicated back that at the point in time that they adopted this rule they had any of their financial institutions saying well, I was with you on IOLTA but I'm not with you on this. So our – the experience of other states is that banks – these are the kinds of things they're accustomed to doing—sending notices to people, communicating to third party people, and giving notices. And they, of course, as the lawyers want to maintain their relationships with their bankers, the bankers obviously want to continue their relationships with the lawyer. And, no, there has not been an abandonment of availability of financial institutions who offer these services as a result of this change in the other states that have this rule.

**JUSTICE WEAVER:** We were all at the meeting yesterday so – you hear different things I guess or maybe you hear it all. The banker that seemed to react initially was certainly questioning and – but soon said he really didn't know anything about it. And that he was gonna check with his group. We were under the – I was the under the impression that the banking group in Michigan had been contacted in some way, but maybe not this particular banker who was on the Commission.

**MS. EVANS:** Correct.

**JUSTICE WEAVER:** And he said he was gonna check with this people. There was someone who asserted that the bankers had been contacted in some way. So – and having heard the whole thing I heard no one say this is a terrible proposal even. If agnostic means – it almost means like its not important enough to people to take a stand about it. But there wasn't just this you better not adopt that idea or it's going to be a disaster. There was no statement from anybody there with respect to that. So there's just kind of a discussion and there was some people that weren't informed. There's another member there who is a banker or some sort of relationship to the banker – a new member right? And I couldn't tell you exactly what she said. I think she had questioning as one would if you're just learning about this is coming up. But apparently it didn't come onto the agenda of the Attorney Grievance Committee for them to – brought to them by their – by the Administrator as Justice Young has described. Mr. Agacinski is agnostic about it – that means not having much feeling about it I guess that's his use of that word. So – and it is correct that everyone seemed to agree with the principle, that this is a very good thing to do because it can catch the wasting of peoples assets because the peoples whose money it is in the trust account have no way many times of knowing their money's even there much less to know –

**MS. EVANS:** Correct.

**JUSTICE WEAVER:** that it's gonna be gone and it's very late in the game when it's gone because oftentimes a person who's using it—that lawyer that has misused it—doesn't have any assets left or he wouldn't have used it in the first place. So certainly it's a worthy idea; I appreciate hearing about it and your efforts. And whether you've communication enough with the State Bar or with the AGC – from the State Bar – you're the State Bar – with the AGC I guess remains to be seen.

**JUSTICE CORRIGAN:** Ms. Evans I just have a little more factual information I'd like. Does New Jersey use the Model Rule that the Committee used? What's its rule?

**MS. EVANS:** I have it with me; I can't remember it off the top of –

**JUSTICE CORRIGAN:** Okay. Is New Jersey's rule similar to the one that you propose for Michigan if you know? And is New Jersey the basis for your estimate that there would be 200 – 200 what?

**MS. EVANS:** 200 notices –

**JUSTICE CORRIGAN:** Overdraft notices.

**MS. EVANS:** Yes.

**JUSTICE CORRIGAN:** Okay, plus it would be 200 responses by the lawyers that have to be associated with the overdraft notice.

**MS. EVANS:** Yes.

**JUSTICE CORRIGAN:** Okay. So – and that's based on New Jersey, but you're not sure what New Jersey's rule is.

**MS. EVANS:** I do have it with me. I don't have it up here at the podium.

**JUSTICE CORRIGAN:** Okay.

**MS. EVANS:** So I can supplement my –

**JUSTICE YOUNG:** There's some really tiny little mechanical things that they suggest just in the thing that Justice Corrigan noted, the necessity of linking the response to the notice could be made easier if the lawyer's required to attach the notice to his response. I mean so there's some just little tiny but in terms of reducing clerical load and things like that that I heard mention that if you really sat down with the Commission and its Administrator you could probably work these out. I didn't sense hostility in any sense, but there is –

**MS. EVANS:** I certainly have a (inaudible) –

**JUSTICE YOUNG:** sense of well, you know I don't think we were really significantly enough involved in the vetting of the final product.

**CHIEF JUSTICE KELLY:** Is there anything else from Ms. Evans? Thank you.

**MS. EVANS:** Thank you very much.

**CHIEF JUSTICE KELLY:** Next we have public comment on Item #3 which is 2009-04 which is the proposed rule for disqualification of Michigan Supreme Court Justices. And the first person on our list is Pat Donath, past President of the League of Women Voters of Michigan. Good morning.

**ITEM 3: 2009-04 – Disqualification**

**MS. DONATH:** Good morning. I'm Patricia Donath. I'm past President of the League of Women Voters of Michigan. And on behalf of the League I would like to thank the Michigan Supreme Court for considering the adoption of rules and procedures regarding judicial disqualification and for the opportunity for the public to speak on this issue. Although the League submitted written comments on the proposed rules, we are here today to emphasize our belief that the final rules should address disqualification from cases in which the legal parties or their attorneys have made a significant financial investment in a justice's election. As you know, third party expenditures on political ads about candidates have outpaced direct campaign expenditures in recent elections to the Court. Because this type of expenditure is currently outside of Michigan's campaign finance system and the Legislature appears unlikely to adopt laws to address this new poll, the League supports the idea that parties and their attorneys appearing before the Court provide an affidavit disclosing all contributions made in efforts to elect justices. Comprehensive disclosure is necessary in order to ensure that Michigan does not find itself with the *Caperton* case of its own. Recent opinion polls show that the public is concerned about a Justice's ability to remain impartial in cases that involve campaign contribution and campaign contributors. We know that this is a matter of concern to each of you, and we trust that the final rules and procedures will reflect the current reality of Michigan's judicial elections as well as the perceptions of Michigan's citizens. To further alleviate potential conflicts of interest the League would also like to urge the Court to pursue public funding for judicial campaigns modeled on the successful North Carolina system. As I'm sure you are aware, the Wisconsin Supreme Court has asked the Wisconsin governor and legislature to enact public funding – a public funding system that would allow Wisconsin Supreme Court candidates to avoid the need to solicit large sums of money in order to run for office. That request resulted in a special legislative session in Wisconsin, but legislation has not yet passed. We urge the Court to consider a

similar request to the Michigan Legislature and Governor. We believe that voluntary use of a public funding support fund as an alternative to private contributions would not only reduce negative public perceptions of the Court's impartiality, but would make most of the current concerns related to judicial elections a thing of the past. Thank you for your time and if – I would be happy to answer any questions you have or in any way that we could help with expanding the rules that you have put before the public.

**JUSTICE YOUNG:** Ms. Donath?

**MS. DONATH:** Yes.

**JUSTICE YOUNG:** Did the – I'm trying to understand what the League's position is assuming we are currently in a non-state financed judicial election situation. The *Caperton* situation involved not direct contributions to the candidate –

**MS. DONATH:** Exactly.

**JUSTICE YOUNG:** but third party activities outside the candidate's election. So let me just – leaving that *Caperton* situation, under Michigan law people and organizations specified in our statute can make legal contributions.

**MS. DONATH:** Right.

**JUSTICE YOUNG:** Those are all online now with the Secretary of State. Does the League have concern that a lawful contribution made under our statute, our election statute, create a problem for disqualification purposes? In other words, if a person appears or a party or a lawyer appears who has made a contribution to one of the members of this Court – a legal contribution – does that create a disqualification concern for the League?

**MS. DONATH:** It doesn't create a disqualification concern from us, and we have been speaking in generalities partially because yes, they're all legal.

**JUSTICE YOUNG:** Yes –

**MS. DONATH:** And therefore –

**JUSTICE YOUNG:** The Legislature made that –

**MS. DONATH:** And therefore should be acceptable.

**JUSTICE YOUNG:** Okay, I just wanted to make sure that you were not – the position of the League was not that whatever the Legislature has said is a legal contribution can nevertheless be a cause for a disqualification.

**MS. DONATH:** Depending on how you chose to do however you want to address this. There is a potential possibility that someone could raise the issue not necessarily cause a disqualification -

**JUSTICE YOUNG:** Well, I've asked you –

**MS. DONATH:** depending on how you do it.

**JUSTICE YOUNG:** But I'm asking – I mean anybody can make a – file a motion for disqualification. I was just trying to figure out whether the League was making a position notwithstanding that the Legislature said this amount is a legal contribution that itself – even though it's a legal contribution – can be a proper ground for disqualification. That's not what you're claiming.

**MS. DONATH:** No.

**JUSTICE YOUNG:** Oh, okay. Thank you.

**JUSTICE CORRIGAN:** So it would be some amount above $3,400 per individual and $34,000 per PAC that you think is a significant financial contribution, correct?

**MS. DONATH:** So if –

**JUSTICE CORRIGAN:** You think if a person filed an affidavit and said they had given more wouldn't they have a Fifth Amendment problem because they'd be committing a crime? And would an affidavit system really work?

**MS. DONATH:** The idea of the affidavit system is all of that now not disclosed money which is currently outside of the system -

**JUSTICE YOUNG:** But you can't make – you cannot make a – an - a legal contribution to a judicial candidate above a certain amount.

**MS. DONATH:** But you can invest legally in a Justice's election activity by making a contribution –

**JUSTICE YOUNG:** No, you cannot. No, no. You can actually – actually you cannot make a contribution to a candidate other than a direct one. That's the real problem

with the *Caperton* situation. The judicial candidate cannot lawfully have any control over what third parties are doing without violating the law. Nor can a third party conspire with the candidate without violating the law. So I'm trying to understand conceptually how affidavits – if we carve out of the equation lawful contributions – direct contributions, how an affidavit system addresses the *Caperton* third party situation. Because as a candidate I don't know what third parties are doing, and I better not know or I'll be violating the law. How does your proposal for affidavits address the *Caperton* situation?

**MS. DONATH:** The Michigan Legislature could adopt disclosure – not regulation – disclosure of all of these third party – and if they did that then – then I wouldn't be making the suggestion because it would all be public –

**JUSTICE CORRIGAN:** Is the League making an approach to the Michigan Legislature to call for that? Have you done –

**MS. DONATH:** Yes.

**JUSTICE CORRIGAN:** Are you doing that?

**JUSTICE YOUNG:** I think that's the problem. This is a – As you said, the Legislature isn't doing something to create complete transparency about the whole segment of the election process or which the candidate has absolutely no control and frankly cannot have any control legally.

**CHIEF JUSTICE KELLY:** But what you believe is that the Court should take action on this matter.

**MS. DONATH:** Yes, and I do not have a citation because it's very recent, but as I understand it the Arizona Supreme Court has adopted a new rule that has an affidavit part to it.

**JUSTICE YOUNG:** Do they have a disclosure requirement as Michigan does for direct campaign contributions?

**MS. DONATH:** Yes, they have public funding but not for judicial races. But they have the same situation in nondisclosure of what we could term issue ads.

**JUSTICE YOUNG:** Okay.

**JUSTICE MARKMAN:** Ms. Donath?

**MS. DONATH:** Yes.

**JUSTICE MARKMAN:** You're doubtlessly aware that for many, many years in Michigan disproportionate numbers of judicial candidates with favored surnames have won judicial elections. That certainly can't be a world favored by the League of Women Voters I would presume.

**JUSTICE YOUNG:** Perhaps you like Cavanaghs and Kellys.

**JUSTICE MARKMAN:** The only way to overcome this it seems to me is by information. Information is required to overcome this circumstance at least on the part of candidates with less favorite surnames. One way to achieve this greater provision of information is through advertising and communicating directly with the people by TV, radio, newspaper, and internet advertising. It seems to me that your proposals, as best as I understand them, all seem to have in common that they would limit campaign contributions and they would tend to deny candidates with less favorite surnames an opportunity to fully make their case to the public. Are you concerned that when you do limit campaign contributions, this does have the affect of limiting the amount, the supply of information, to the public, and therefore enhancing the role of surnames, and therefore enhancing the likelihood of a court in which you have a limited number of surnames being represented. Are you concerned about this at all?

**MS. DONATH:** You'll find it is part of the North Carolina Public Funding system. There is a voter guide that goes to every voter.

**JUSTICE MARKMAN:** A photograph.

**MS. DONATH:** A voter guide -

**JUSTICE MARKMAN:** A voter guide.

**MS. DONATH:** with information about the candidates running for office.

**JUSTICE MARKMAN:** So you think the voter guides that one picks up in libraries that the League of Women Voters puts together is an adequate substitute for that?

**MS. DONATH:** The – it would be a much enhanced over what the League is able to do with our funding because every voter gets in the mail the voter guide from North Carolina.

**JUSTICE MARKMAN:** Am I fairly equating money in the political – in the judicial electoral process with the ability to provide information to the public?

**MS. DONATH:** I guess – I'm not – I'm not sure of your question. I have to say that the League is very concerned that information – that the voters get information. But we are also very concerned that the information that voters are getting in 32nd ads is not the kind of information voters need.

**JUSTICE MARKMAN:** But is it better than no information, or is it better than – I agree with you, it's not perfect information. We've all seen ads that are distorted and imperfect, but is the information in the 32nd advertisement that you're talking about at least better than no information or information that's based upon nothing than say for example looking to a candidate's surname?

**MS. DONATH:** We think there's a better way.

**CHIEF JUSTICE KELLY:** Thank you. Our next speaker is William Dunn of the State Bar of Michigan. Good morning.

**MR. DUNN:** Thank you. May it please the Court. William Dunn for the State Bar of Michigan. The State Bar Board of Commissioners considered key questions of substance and procedure that were implicated in the specific proposals that accompanied the order of this Court under now - under consideration today as well as the subject generally rather than focus on the proposals themselves. Seventeen points of comment were contained in two letters from the State Bar, and I would like to try to summarize those points today. First, there should be a single set of uniform principles for disqualification applicable to all judges including Justices. Different procedures for Supreme Court would be appropriate. On matters of procedure, disqualification should be raised formally by a party if not by the judge, but not by fellow judges. The rule that we publish should conform that primary – the primary obligation for disqualification is on the judge not a party. A judge's ruling on disqualification should be in writing and it should be reviewable. And in the case of a Supreme Court that review - the State Bar recommends that the review be conducted by an independent panel if we can find a way to create one. Disqualifying causes should include the instances already present in the court rule. The circumstances - some circumstances derived from Model Rule – from ABA Model Code 2.11 specifically presiding over a case in a lower court, former services of government lawyer, and extra judicial public comments that commit, and a circumstances where impartiality might reasonably be questioned. In the rule referring to bias, replacing the word "personal" with the worth "actual" should be further considered if it is intended to be a substantive difference between - by that change. A duty to sit can be recognized but as in the ABA Model Code that should be subject to disqualification requirements. The U.S. Supreme Court, as noted most recently in *Caperton,* that the Code of Judicial Conduct exists to serve higher standards than due process – we commend the court the willingness to consider this difficult subject and wish it well on further deliberations.

**CHIEF JUSTICE KELLY:** Questions?

**JUSTICE YOUNG:** Yeah. Why would a fellow judge be precluded under the Bar's principles from raising a basis for disqualifying another judge?

**MR. DUNN:** It would be a matter of policy your honor as to whether or not it would be healthy within a court for a judge to formerly raise the question, and I stated formally raised by the judge and other parties. Certainly, the discussions among the Justices or judges in a multi-judge court could well address these subjects directly.

**JUSTICE YOUNG:** What is the – The Bar proposes that there be the decision – the initial decision of a judge whether to disqualify or not should be subject to review. And the Bar proposes panels as an appellate review process. What would be the constitutional authority for any – assuming that the court itself, let's leave it to the Supreme Court. Assuming the Court itself has the authority to remove an elected Justice from the case, what would be the constitutional authority for any lesser body to do so?

**MR. DUNN:** It would seem, and we raised the same questions – the constitutionality of any such course –

**JUSTICE YOUNG:** You recommended it.

**MR. DUNN:** There would be a view that a judge's disqualification is not jurisdictional within the court itself.

**JUSTICE YOUNG:** No, but it implicates – it implicates the political process. The people have elected a, in this case a Justice, and a removal from a case constitutes, I think, a significant impingement on that democratic process. I don't see – so I'm therefore asking what is the obvious constitutional authority of some entity, lesser than the court itself, from causing that dislocation of the electoral process?

**MR. DUNN:** Other than the court itself and, of course, a judge or Justice can disqualify –

**JUSTICE YOUNG:** I'm not – I'm talking about –

**MR. DUNN:** him or herself.

**JUSTICE YOUNG:** involuntary disqualification.

**MR. DUNN:** Involuntary, yes. We do not have any clear opinion that the Constitution is not implicated by – and the issue deserves study. If the Court adopted a

court rule indicating that the Court wished to have an independent panel consider the question, then the judge would – then the Court would seem to have authority to do that.

**JUSTICE CORRIGAN:** Would the independent panel be lawyers, or judges, or who? You don't know.

**MR. DUNN:** Putting flesh on those bones your honor really has not been done, but one of the suggestions is that it be a randomly selected panel of retired judges.

**JUSTICE YOUNG:** Is this an advisory panel?

**MR. DUNN:** It could be.

**JUSTICE YOUNG:** Well, I'm trying –

**MR. DUNN:** Or it could be an appellate panel.

**JUSTICE YOUNG:** to understand what your proposal is because I have a basic premise that – I said assuming that the entire Court could remove a Justice in a particular case, I'm having difficulty understanding how any lesser body, including the chief judge, has constitutional authority to do so even if the Court chooses to delegate – attempt to delegate that responsibility by court rule. Do you have a – does the Bar have a –

**MR. DUNN:** We do not have a constitutional answer. The Bar Commissioners indicated that they would be in support of a constitutional referendum if necessary to deal with this question.

**JUSTICE MARKMAN:** Mr. Dunn?

**MR. DUNN:** Yes, Justice.

**JUSTICE MARKMAN:** I think most people would agree that labor unions have interests in the decisions of this Court, and businesses have interest in the decisions and outcomes of this Court, and bankers have interest in the decisions and outcomes of this Court, and gun owners do, and people who favor the pro-life cause or the pro-choice cause do, and tool and die manufacturers have an interest in the decisions of this Court, in your judgment as a representative of the Bar do you think that lawyers as a profession have any cognizable interests in the views that can be furthered or impeded by judicial decisions and what would those be in your judgment? For example, do lawyers as a class have an interest in more litigation? Do they have interest in new causes of action, new claims? Do they have an interest in those kinds of things at all as a class?

**MR. DUNN:** At the level of professional responsibility your honor, lawyers have the same commitment to justice that judges would.

**JUSTICE YOUNG:** So lawyers have no skin in the game is that what you're saying sir?

**MR. DUNN:** From the statement of the Bar as a matter of principle that is absolutely correct.

**JUSTICE YOUNG:** I'm not – I'm asking you as a representative of the Bar –

**MR. DUNN:** That is the way I see it.

**JUSTICE YOUNG:** the same question that Justice Markman asked.

**MR. DUNN:** That is the way I see it if you're asking for my individual (inaudible).

**JUSTICE YOUNG:** Okay. So you think that lawyers do not – are not an interest group that have a stake in the decisions, other than at the most ethical level of wanting to see justice done, there's no pecuniary interest that lawyers have in the decisions of the Court.

**MR. DUNN:** Well, I recognize that that may not be true for everyone in the Bar. After 45 years of practice I still maintain that ideal.

**JUSTICE YOUNG:** That's not your ideal, but you recognize that lawyers do have a pecuniary interest.

**MR. DUNN:** I recognize that lawyers have an interest in the outcome of any matter that they are involved in.

**JUSTICE MARKMAN:** So if a candidate then – a judicial candidate – receives what we would all view as an extraordinary large contribution from a labor organization, or a business organization, or a gun organization, or some other organization that ought to be looked at askance. But if that contribution comes from a lawyer's organization, or lawyers as a class, that's just good government. Is that right?

**MR. DUNN:** I don't think we came up with –

**JUSTICE MARKMAN:** Explain to me –

**MR. DUNN:** any differentiation between one group or another that would support election of Justices or judges. In fact, there is no recommendation in the State Bar commentary that discusses campaign contributions, that's not within the purview of our comment.

**CHIEF JUSTICE KELLY:** Are there any other questions? If not, thank you sir.

**MR. DUNN:** Thank you very much your honors.

**CHIEF JUSTICE KELLY:** Next is Rich Robinson of the Michigan Campaign Finance Network. Good morning Mr. Robinson.

**MR. ROBINSON:** Thank you Madam Chief Justice and Justices. My comments are on the subject also of campaign spending and disqualification of Supreme Court Justices. I would say only relative to written comment that I submitted that the recent position of the Standing Committee on Judicial Dependence of the American Bar Association tracks very closely in principle with the comments that we submitted, and I would also apologize a renegade page break made its way into the hard copy version of the comment I submitted. What I – the reason I asked for a minute this morning is to introduce one other aspect of considering money and disqualification, and that's germane to idea of a debt of gratitude, and what we might consider the modern era of Michigan Supreme Court campaigns. Since 2000 when candidate focused issue advertising became a dominant piece of the campaign spending the candidate with the greater financial support has won 9 out of 10 times. As far back as I can extend the research prior to 2000, from 1984 through 1998, the candidate with the greater financial support has won 10 times, lesser funded candidates won 8 times. Included in that number were 3 challengers - members of this current Court. It's not to suggest causality only that there's a very strong correlation that money matters in the outcome of an election.

**JUSTICE YOUNG:** What was the split – 10/8?

**MR. ROBINSON:** Yes. Yes, sir. That it matters in the outcome of elections. This tracks also with legislative races. For example, in the 2008 Michigan legislative races money won 95% of the time. Money matters.

**JUSTICE MARKMAN:** But would you answer the question I addressed earlier. Yes, money does matter. Nobody can dispute that money matters. But absent money, other things would matter more. And I suggested one of those things was surnames. Tell me why that's incorrect? What would matter in the absence of money? Things always matter in campaigns. Campaigns are decided by a variety of factors, and you're undoubtedly correct that money is one of those factors. But by taking money out of the campaign and by depriving the public of the information that such money would purchase what would then matter? What would the world be like if you were to remove

that money? Would it not be at least in part a world in which surnames and the ethnicity of one's surname became increasingly important?

**MR. ROBINSON:** Mr. Justice I haven't suggested taking money out of campaigns at all, and – For example, Justice Young asked the question also could it be possible that a legal contribution could be grounds for disqualification, let me give you an example. In the state of Michigan we have no contribution limits on political action committees in the state parties. What, for example, if an individual set up a phony PAC, was the only contributor to it, it was really the only financial support of a candidate, and that candidate won. It's all legal, all down the line, the contribution to the PAC is legal, the independent expenditure is legal, but this is precisely where *Caperton* landed that it's not just contributions to the candidate committee, but it's independent expenditures as well that can deprive the legal opponent of due process. And it was the hope of Justice Kennedy that somewhere short of deprivation of due process this Court would have a rule that said we go this far with the money and then there's an intersection between free speech rights, spending unlimited money, and a prohibition against hiring the judge to hear your case. And so that's really the issue. It's not cut and dry –

**JUSTICE YOUNG:** Where's the line?

**MR. ROBINSON:** Pardon me?

**JUSTICE YOUNG:** Where's the line?

**MR. ROBINSON:** Well, that's to be determined.

**JUSTICE YOUNG:** No. We're sitting here trying to make a rule and you're saying well, figure it out.

**MR. ROBINSON:** Well, for an example –

**JUSTICE YOUNG:** And I – the reason I talked about the division between *Caperton* issues and direct campaign contribution issues is the Legislature's made a line. The Legislature said if you give up to this amount it's a legal contribution. Are you challenging the legal contribution as established under the state election laws can nevertheless be a basis for a disqualification – a proper basis for a disqualification motion?

**MR. ROBINSON:** Contributions to the candidate absolutely not.

**JUSTICE YOUNG:** Okay. All right.

**MR. ROBINSON:** So what I am saying –

**JUSTICE YOUNG:** So we're talking about the *Caperton* issues now.

**MR. ROBINSON:** is when one chooses to shuffle the money into a PAC pocket and let the PAC do the spending, that's all legal too, and that could be very morally and ethically the grounds for disqualification. And furthermore, this whole question of the money underlying candidate focused issue advertising, that's certainly a huge part of the campaigns and the outcome, and if one does not have an affidavit you've essentially got a policy of don't ask don't tell. And I would submit that when the tree falls in the forest it makes a sound regardless of who's there. It should be known.

**JUSTICE YOUNG:** But isn't this an issue – The Legislature has chosen for any number of reasons I suppose not to require the third party campaign process to disclose as is required when you give campaign contributions directly to a candidate. Isn't that really the problem the Legislature has chosen not to make disclosure required in that sphere as it has in the direct campaign contribution arena?

**MR. ROBINSON:** I think they've handed the problem to you though sir. We've got a ruling now in *Caperton* that says there certainly are limits, and as Justice Kennedy said in order for the court to have the legitimacy of public support of its impartiality, belief in its impartiality, you're going to have to draw a rule, somewhere short of deprivation of due process, a law that said this is how far we'll go with this. Yes, people have rights to speak, but yes, people who appear in this Court have a right to what - for appearances as well as reality - is an impartial court hearing. And that's – that's the real crux of the issue here is what do we do at that intersection.

**JUSTICE CORRIGAN:** What do we do?

**MR. ROBINSON:** Well, we polled state voters and it was included in our written comment, should a judge be allowed to hear a case in which one of the participants spent $50,000 supporting a judge. Overwhelmingly, the voters of this state said no. And by the way Justice Markman, I would certainly include attorneys in this not just litigants, or business interests, or labor interests, all parties certainly.

**JUSTICE MARKMAN:** But when you say you don't favor limiting money in the process, I respect what you say, but it's kind of illusory when you're basically doing what you can to discourage people from participating in the process.

**MR. ROBINSON:** No, not discouraging. I would say speak robustly as you will as far as your bank account will let you, but bear in mind that the judge you're supporting may not be able to hear your case.

**JUSTICE YOUNG:** How about the judge you're opposing?

**MR. ROBINSON:** Well, this is an interesting question, and if we can take it that - well I would say this. Simply to say you must hate me because I tried to beat you and I failed is really a wrong minded argument because –

**JUSTICE YOUNG:** Is - a debt of ingratitude is irrational, but a debt of gratitude (inaudible)?

**MR. ROBINSON:** It may be – you know I can understand a rational for it, but it's not real because it has not changed the situation materially. Successful support has materially resulted or may have resulted in a Justice ascending to a seat. However, if I failed to knock you out, I have not changed the material circumstances. So if you hate me because I tried and you recognize that in yourself, well maybe you ought to disqualify.

**JUSTICE YOUNG:** Did you poll – did you poll the public to determine whether if somebody spent $50,000 against a judge they should be disqualified? Because I bet people would say either way it makes a difference.

**MR. ROBINSON:** Well, not only has failed opposition –

**JUSTICE YOUNG:** Whether it does or does not is apparently not at issue here it's the perception that we're dealing with right?

**MR. ROBINSON:** Well, I – there's a practical matter of there is a duty to sit, and if the material circumstances have not been changed by the campaign spending I'd say the duty to sit has to prevail otherwise people could be knocking you out at will. But – well, I tried to beat you so you can't sit on my case.

**JUSTICE YOUNG:** Well, but – but we're making an assumption that the – a favorable contribution in a third party campaign creates a favorable disposition in a judge. Why is it irrational to suggest that an equally significant contribution against a judge isn't also having an impact on the judge's disposition?

**MR. ROBINSON:** Well, as I've tried to point out, in the modern era money matters, and so –

**JUSTICE YOUNG:** Well, if it matters (inaudible).

**MR. ROBINSON:** So my successful overlarge support can actually be a reason and you should have a debt of gratitude. But the fact that my unsuccessful –

**JUSTICE YOUNG:** Why shouldn't I be – Why can't I be just as completely ungrateful – In fact, when I talk to people I say you can make the contribution, but it has no difference about how I make my decisions. I'm eternally ungrateful.

**MR. ROBINSON:** Well –

**JUSTICE YOUNG:** And why isn't that – why isn't that a perfectly legitimate concept that I'm here because I believe in the rule of law and I'm going to go wherever the rule of law is. I hope you support me because you like judges who like the rule of law, but I'm not – I'm not grateful to you for your contribution.

**MR. ROBINSON:** True enough your honor. It's just that *Caperton* has brought us to a point where we have to recognize that there is a recognized probability of bias at some point. And as Justice Kennedy has suggested, and I would certainly support, we hope that this Court will draw a line somewhere – the right side of probability of bias of deprivation of due process of law and say you know that's how far we're going to let people go with this –

**JUSTICE CORRIGAN:** Mr. Robinson?

**MR. ROBINSON:** because if you want us to hear your case.

**JUSTICE CORRIGAN:** Mr. Robinson? The problem that really bothers me is the *Caperton* problem itself because Michigan has that potential as your very own reports of the Michigan Campaign Finance Network have shown. What do we do here about the problem of the anonymous donors? I think in the last election – to the tune of $6 million in anonymous contributions am I correct?

**MR. ROBINSON:** In this election –

**JUSTICE CORRIGAN:** What do we do about that –

**MR. ROBINSON:** it was $3.8 million –

**JUSTICE CORRIGAN:** $3.8 million.

**MR. ROBINSON:** It was over half the money.

**JUSTICE CORRIGAN:** Right.

**MR. ROBINSON:** And this is where the affidavits come in. We can't –

**JUSTICE CORRIGAN:** So an affidavit from one who has contributed anonymously we would expect them to disclose the amount of their contribution on the issue ad expenditure.

**MR. ROBINSON:** That's right. And I think we would have to hope that the aggregator practically speaking the political parties and the Chamber of Commerce have been the aggregators –

**JUSTICE YOUNG:** And the AFL-CIO, UAW –

**MR. ROBINSON:** They haven't done television issue ads, and that's what I contract –

**JUSTICE CORRIGAN:** Well, why don't we – why don't we require affidavits from the aggregators then?

**MR. ROBINSON:** Well –

**JUSTICE CORRIGAN:** So you're gonna require the disclosure of actual expenditures as opposed to the anonymous – anonymity – that existed.

**MR. ROBINSON:** Yes.

**JUSTICE CORRIGAN:** And we should do that by court rule and the decision of (inaudible).

**MR. ROBINSON:** Well, I'm suggesting –

**JUSTICE CORRIGAN:** May I ask another question? If $50,000 is the limit, that would disqualify political parties from being involved in funding judicial campaigns correct? So no one on this Court can sit on reapportionment.

**MR. ROBINSON:** Well, there –

**JUSTICE CORRIGAN:** Right? Because it's - $68,000 is the legal limit and the citizenry are offended by that amount – the Republican and the Democratic parties should not be allowed to contribute $68,000 to our campaigns correct?

**MR. ROBINSON:** You've got me there. That – this is one of the complexities that needs to be worked out in making a good rule.

**JUSTICE CORRIGAN:** All right.

**MR. ROBINSON:** But that's certainly one of the dilemmas –

**JUSTICE WEAVER:** Well, not every candidate will receive the $68,000 (inaudible) –

**JUSTICE CORRIGAN:** Well, then the problem

**JUSTICE YOUNG:** But the party –

**JUSTICE WEAVER:** even if the party wants to give it to them.

**MR. ROBINSON:** But in fairness to the – If the aggregator showed up in this courtroom, certainly they should say that.

**JUSTICE CORRIGAN:** But how do we really get at the truth? How do we get at the truth?

**MR. ROBINSON:** Well, this is a fallback position Justice Corrigan because I truly do wish that as elected officials say they believe in transparency and accountability I wish they could walk that talk. But it doesn't seem to be in the cards with this Legislature frankly. So at least what you can do is preclude the possibility of someone being deprived of their due process in this Court.

**JUSTICE YOUNG:** Well, I mean as a practical – you're at 30,000 miles high in terms of abstraction. Let's get real particular. Let's say there is an aggregator out there who for a special interest, let's leave it unspecified, they aggregate the funds, how do I know – I mean if that aggregator isn't a party, how's the system you're thinking about work?

**MR. ROBINSON:** Well, the aggregator has to decide if they're willing to give the contributor cover as they file a false affidavit.

**JUSTICE YOUNG:** Who is the – who is the party that has to file the affidavit? I mean –

**MR. ROBINSON:** It's the party who appears in the courtroom –

**JUSTICE YOUNG:** Okay.

**MR. ROBINSON:** litigant, counsel, whomever –

**JUSTICE YOUNG:** All right.

**JUSTICE MARKMAN:** But maybe that party has given nothing. Maybe neither of the two parties have given anything. You've got a tort reform case for example and one Justice has received $100,000 from pro-tort reform people and another Justice has received $100,000 from anti-tort reform people, who would file the affidavit in that case?

**MR. ROBINSON:** I don't think anyone would. I don't see a trail of breadcrumbs going to any participant in that case.

**JUSTICE MARKMAN:** But you don't think there's some question –

**MR. ROBINSON:** Someone of your kind has given money – I don't think you can be tarred with that same brush.

**JUSTICE MARKMAN:** So there's no impropriety in either of those Justices sitting on that case when one has received $100,000 in favor of the interests being pursued in that case. The cases coming before this Court are not personal cases entirely in which you have plaintiff A against defendant B. They deal with issues that are applicable to 100 other plaintiffs and defendants. You can't look at them as just personal to the two parties before us. We try to take those cases that are most important to the larger interest of the state. Who would file the affidavit when you had a tort reform proposal before this Court and huge amounts of money have been given to various justices based -

**JUSTICE YOUNG:** Judicial philosophy.

**JUSTICE MARKMAN:** upon whether a group is pro-tort reform or anti-tort reform.

**MR. ROBINSON:** I don't think there's any prohibition against supporting someone of a philosophy that you share. It's when the interests become greater than that. That's what *Caperton* was about. It was not a limitation on a philosophy.

**JUSTICE YOUNG:** It most certainly is. I mean that's what this is about. This is – that's why we have disputes about judicial philosophy in this state. There are people who share one judicial philosophy and some of us a different one and those things matter when it comes to making a decision.

**JUSTICE WEAVER:** Mr. Robinson? Is what you have – although these conversations are pertinent, there are other pertinent matters. Aren't you trying to as to disclosure on these PACs that are formed that will contribute by ads to one candidate or another, they may not name them or the can name them, but they can spend the money and it's not disclosed as to where all the money came from. Aren't you asking for disclosure for that money?

**MR. ROBINSON:** Well, in an ideal world absolutely yes. And more than –

**JUSTICE WEAVER:** And are you not asking us as a Court to stand up for that principle or are there those here – For instance, if a judge here, someone forms a PAC then that they don't have to report, but they spend a lot of money for advertisement for that judge – candidate or judge – Justice's reelection – are you saying – and are you saying that we should at least advocate and by whatever rule we can, if we can, but we should be telling the Legislature that the public has the right to know that for instance if Justice M had a PAC formed that basically was funded hundreds of thousands of dollars for advertisements for their reelection that people should know who it is that funded it and how that money got in there. So that the public would know in the future too when a case came up for that particular party who funded at that time and now they're a party in a case that Justice X or Y or whatever actually received hundreds of thousands of dollar help to get there. Is that what you're driving at?

**MR. ROBINSON:** Well, I'm certainly driving at that disclosure, but that truly is a legislative function -

**JUSTICE YOUNG:** Yeah.

**MR. ROBINSON:** and I'm not optimistic about it. But what –

**JUSTICE WEAVER:** But are you not asking us -

**MR. ROBINSON:** this Court can do –

**JUSTICE WEAVER:** stand for that principle. We should be telling the Legislature that that is what needs to be done so that the public knows who's getting the money secretly (inaudible), and not – they – not should be secret. It doesn't then keep public interest or individuals from giving all of that money and spending it on ads on – for that person's benefit. But that people should know who did it. It should be as matter of record. Because then that person may not have a case or be a party at the time of the contributions, but they may have a case later. And the public should know.

**JUSTICE YOUNG:** Usually PACs aren't parties.

**MR. ROBINSON:** Well, and that's the problem –

**JUSTICE WEAVER:** Oh, but they can be – they can –

**MR. ROBINSON:** Well, PACs disclose –

**JUSTICE WEAVER:** 80% of the money given by one person. You know I gather in the past most of this money is always secret, but there have been a couple of times in the last 10 years, at least once, where it was pretty transparent by the records that people came out and showed how much actually was given on behalf of the candidate or not – is that not true?

**MR. ROBINSON:** A true PAC does disclose its contributors and its expenditures. The political parties, 501(c)(4), (5), and (6) organizations, 527 organizations, operate with a different set of rules. If most of what you do is politic advertising, you're either going to be PAC or a 527. If most of what you do is something else, some other kind of advocacy or being an association, then you can – you are a (c)(4), (c)(5), (c)(6), and you don't have to reveal who you're contributors are. So – and, of course, I can't understand what the ethical underpinnings are for saying the political parties in this state don't have to disclosure who's giving them money. I mean in the soft money era in federal politics, all the soft money to the federal parties was disclosed. And – but this is another deficiency – if the Legislature –

**JUSTICE YOUNG:** That's why the 527s came into be.

**MR. ROBINSON:** Well, they've fallen out of favor too because –

**JUSTICE YOUNG:** You step on one part of this balloon and it goes (inaudible) –

**MR. ROBINSON:** Well, that's right because 527s have fallen out of favor and now people are looking for the right 501(c) organizations to use because you can keep hiding the ball. You can't hide the ball in the 527, they disclose to the IRS. And you can see who's giving the money. But what I'm trying to do is to be helpful to the Court and say boy, if we had a different Legislature – We have that disclosure, that transparency and accountability that we really need for a functioning democracy. But the part that you can control is when people come into your courtroom to say you need to file an affidavit and show us where you've been putting the money. And as I say, there is a hazard that they may lie and file a false affidavit, and then it becomes a question is – will the aggregator provide cover for them. And you know I don't know what kind of inquisition we'd have to get into to take this thing all down the food chain to find all the players, but it's something within your power to do and I think it would be a very healthy development.

**CHIEF JUSTICE KELLY:** Has any other court used an affidavit system?

**MR. ROBINSON:** I believe the answer is yes, but I don't have a citation. I could certainly seek out –

**JUSTICE YOUNG:** It would be helpful because the devil is in the details.

**MR. ROBINSON:** Yes, sir.

**JUSTICE MARKMAN:** I mean is there any way that you could conceive of a broader affidavit – I think you're views are pretty interesting here, but is there any way that you can conceive of a broader affidavit requirement so that we could take into consideration those instances in which perhaps plaintiff A and defendant B haven't given money, but what's at issue in a case involves you know great amounts of money that have been contributed by PACs and outside aggregators?

**MR. ROBINSON:** Well, yes, and again the devil is in the details and where is the bright line. And then, of course, in *Caperton* there was the question of what's the shelf life, what's the timing, all of those kinds of considerations. They're complexities to be worked out. But at the core, I understand as long as we're electing our Justices and we have campaigns money's going to be involved in this process. But the question is, when is enough enough.

**JUSTICE MARKMAN:** But the difference is that when you talk about a trial court what they're deciding is usually the immediate case before them - whether plaintiff A wins or defendant B loses. When you get to this Court, because it's a court with discretionary jurisdiction, we only take a very small number of applications for appeal to this Court and generally they're those very cases in which the controversy stands for a controversy that exists in a large number of cases. So it seems to me you need to do something broader than the kind of very limited affidavit you're talking about.

**MR. ROBINSON:** But I'd be leery of saying because you're of a kind, because you're pro-tort reform or anti-tort reform, I can't hear your case either. I mean I – it seems to be me -

**JUSTICE YOUNG:** Why not?

**MR. ROBINSON:** that there's got to be a more direct line.

**JUSTICE YOUNG:** Why isn't that bias? Why isn't that considered biased? If I say I don't care what the – as long as the law says this that's what the result you're gonna get and I don't care what the equities are. Or if I say you know I think you have to consider the equities of a case no matter what the statutes says, those two views result in different outcomes or can. Why isn't that in play here? And why isn't that why people invest in elections of judicial candidates precisely because it matters how a judge views his or her role in deciding cases?

**MR. ROBINSON:** Well, fortunately the instances where there are the gross – grossly excessive sorts of expenditures either into PACs that will in turn make independent expenditures or through an association are relatively few – relatively. Most of what goes on is legal with the exceptions of the big battleships out there that have no identity as to who's putting the fuel in the tank, and those are things that I think need to be addressed.

**CHIEF JUSTICE KELLY:** The question before the Court right now is whether we should leave the situation as it has existed with no specific rule applicable to Justices of the Supreme Court respecting recusal, or whether we should adopt one of three proposed rules. I recognize that – that perhaps none of the three proposed rules adequately addresses all your concerns, but with the idea in mind that we don't want the perfect rule which doesn't really exist to be the enemy of a good rule, do you believe that any of the three proposed rules is a good rule or a better prospect than leaving things as they are?

**MR. ROBINSON:** I think that there are better prospects to – than leaving things as they are. But as a nonattorney I want to confine myself to my area of expertise here, and it's really about the intersection of the money and politics and cases that I feel best equipped to speak to. And I guess I'm gonna have to punt.

**JUSTICE MARKMAN:** If I could just take respectful disagreement with our Chief Justice, we do have a rule. We've had a rule for 107 years, and for 107 years Justices have regularly been recusing themselves in appropriate cases. So the issue, at least in my judgment, is not whether or not to have a rule, but what the right rule is. We do, I believe, have a longstanding rule.

**JUSTICE YOUNG:** That happens to be the rule – the same rule of the Supreme – the United States Supreme Court.

**JUSTICE WEAVER:** We have no written, clear, concise rule.

**MR. ROBINSON:** The Justices at the U.S. Supreme Court don't get involved in multi-million dollar election campaigns, and frankly we've got this dilemma of most of the money in the election campaigns is in this don't ask don't tell sphere, and somehow we've got to break that open.

**JUSTICE YOUNG:** That's the Legislature – that's the part you say the Legislature needs to address.

**MR. ROBINSON:** Unless contributors happen to appear in this Court, and you could require an affidavit.

**CHIEF JUSTICE KELLY:** Thank you Mr. Robinson.

**MR. ROBINSON:** Thank you.

**CHIEF JUSTICE KELLY:** Next is Timothy Baughman of the Wayne County Prosecutor's Office.

**MR. BAUGHMAN:** Good morning. Chief Justice, members of the Court. I don't know anything about politics or money so I'm gonna have to talk about something different. I have sent two letters to the Court, one with a joint letter from myself and Justice Boyle, and then a follow up letter after the *Caperton* decision that was primarily triggered by some comments that were in Lawyer's Weekly that I thought were overreading that case. So, essentially, my views and those of Justice Boyle are contained in those letters so I wanted to emphasize a couple of points. I think it is fine to make absolutely clear that there is a rule with specific provisions that applies to the Supreme Court whether it's 2.003 or a separate rule doesn't make a lot of difference to me. I favor, as does Justice Boyle, provision A – alternative A – with a little bit of tweaking that is noted in my letter that I'd want to emphasize. I do believe some kind of a catchall provision is needed to be added unless I'm misreading the provision. If *Caperton* happened here, and I would say *Caperton* is a – as the majority even stressed in *Caperton* – is unique in that it wasn't simply a lot of money given to a candidate by somebody who favored a side, it was somebody giving a lot of money to a candidate as their case was winding through the system. So you really have to look at that case closely to see what its saying. I think it's really quite limited. But if that somehow could actually happen here, I don't see anything in A that would catch it because there's not a – there's not a final catchall in what the initial letter I sent along with Justice Boyle proposes is an additional catchall that would say other like circumstances or an objective person would have a substantial doubt as to the impartiality of the forum. So –

**JUSTICE YOUNG:** Is that an appearance of impropriety standard?

**MR. BAUGHMAN:** It's – I think it's the objective standard that *Caperton* says has to exist. The current rule, 2.003, is not simply an actual bias rule. It says that a judge is disqualified if the judge cannot impartially hear a case A and then there are a number of other circumstances where a judge has to disqualify. They're not subsections of actual bias, they are other circumstances where as I view it what they're saying is the appearance is sufficiently strong. An objective person would say if you're related within a certain degree of consanguinity to a party, maybe I hate that person, that relative, and it's not gonna bias me in any event, but the current rule would say an objective person –

**CHIEF JUSTICE KELLY:** The current rule – you're talking about 2.003.

**MR. BAUGHMAN:** Yes.

**CHIEF JUSTICE KELLY:** It doesn't talk about Justices of the Supreme Court does it?

**MR. BAUGHMAN:** No, it doesn't. So –

**CHIEF JUSTICE KELLY:** There's no rule that talks about Justices of the Supreme Court is there?

**MR. BAUGHMAN:** It just says – I think it just says judges there if I'm correct. So I – that's why I say I don't have a problem with a rule that either says 2.003 includes Justices or you have a separate rule because I believe the procedure should be different I think a separate rule makes sense. My point with regard to proposal A was simply I would add in something that would cover a circumstance that 1 through 6 doesn't. You can't cover everything I don't think. And the current rule for other judges says including but not limited to – there's no including but not limited to in proposal A so I think you need something as a catchall. The other tweak that Justice Boyle and I propose is the beginning – the beginning paragraph said that – unless one of the conditions specified -

**JUSTICE WEAVER:** Excuse me Mr. Baughman.

**MR. BAUGHMAN:** Pardon me.

**JUSTICE WEAVER:** Are you here speaking for Justice Boyle?

**MR. BAUGHMAN:** I'm speaking as to what is in the initial letter we sent yes. I'm not – as to answering questions I'm on my own.

**JUSTICE WEAVER:** We know that Justice Boyle joined your letter, so we appreciate that -

**MR. BAUGHMAN:** Okay.

**JUSTICE WEAVER:** for what it's worth. Okay, thank you.

**MR. BAUGHMAN:** Yes, I spoke to her before I came and – to make sure that –

**JUSTICE WEAVER:** She's speaking –

**MR. BAUGHMAN:** That's she on – you know that I was free to say that as to the matters that we discussed in the letter that she is still in concurrence with those positions.

**JUSTICE WEAVER:** But not some of your positions you're taking now.

**MR. BAUGHMAN:** Anything that I said that's beyond the scope of the letter no because she'd have to be at my side –

**JUSTICE CORRIGAN:** Does she support adding the catchall?

**MR. BAUGHMAN:** Yes, she signed that letter. She signed the letter; she authorized me to say at the end that she concurred in the letter in its entirety. And the other –

**JUSTICE WEAVER:** Okay, thank you (inaudible).

**MR. BAUGHMAN:** The only other minor point I had was at the beginning of the rule it said unless one of the conditions specified below is met it is the duty of a Justice to serve in every case and a Justice is not mandatorily required to withdraw from serving in the case – I would just end it after "it is a duty of a Justice to serve in every case". If you're not disqualified, you have to serve. And I think that should also be the case. I would propose the current 2.003 for the other judges also read that way. I've seen circumstances where judges just – there are certain attorneys they don't like dealing with and don't want to deal with any more so they disqualify themselves to not deal with that attorney. And I don't think that's an appropriate thing to do. If they're not disqualified for reasons specified in the rule, they should sit.

**CHIEF JUSTICE KELLY:** I find it an interesting proposal, but have you – I wonder if it's applicable to Supreme Court Justices. Again, the rule that exists in writing doesn't directly pertain to Supreme Court Justices. It's obvious that we have no place to appeal under that rule for example. Have you found a situation where a Justice of this Court has been unwilling or wanted to – or did disqualify himself or herself because he didn't or she didn't like a litigant or the attorney?

**MR. BAUGHMAN:** No, no, never.

**CHIEF JUSTICE KELLY:** So why do we need this duty to serve? It seems to me we're – if there's anything we're unanimous about it's our dedication to serving.

**MR. BAUGHMAN:** Well, if the Court is of the mind that if not disqualified it has a duty to sit, then why not say so? I mean why not just say that is our duty. If we're not disqualified –

**CHIEF JUSTICE KELLY:** Because it's not an obvious need to (inaudible) –

**MR. BAUGHMAN:** Well, it just seems to me if we're going to however set down in writing what the rules are if one of the operating procedures is we sit unless

disqualified then I think one would say that in the rule. But I agree with you, I've never known of a Justice to disqualify because of an aversion to an attorney. I have known that to happen in lower courts. I think – I frankly think judges and Justices in my 34 years have disqualified too readily for other reasons. I don't – I have little concern and circumstances are perhaps that others do with Justices participating. I don't think – I think you all regard your oath highly and that somebody contributed to you, that you're related to somebody who's not a party who may be a judge in a lower court, shouldn't disqualify. Actually to –

**JUSTICE CORRIGAN:** But wouldn't that – If we adopt 2.003 as it stands, some Justices of this Court have served for example as you well know when they're relatives are judges on lower courts. If we adopt 2.003 and apply it to ourselves, will that not for example require Justice Cavanagh to DQ himself if Mark Cavanagh is on the panel? Or would it not have required Justice Griffin to DQ when his son was on a panel. What's your view?

**MR. BAUGHMAN:** Unless I'm misreading it, I see nothing in proposal A that would require that. That a relationship of a Justice on this Court to a judge on a lower court – to a judge on a lower court –

**JUSTICE CORRIGAN:** Who's not DQing.

**MR. BAUGHMAN:** would not have to recuse. And in fact I would encourage that that be the case. If I'm not mistaken, for example I know other Justices and judges have behaved in the same fashion that is they were fairly routine to disqualify when there's a relationship with a lower court judge. I actually had a case where Justice Boyle was on the Court, Judge Boyle had dismissed the case, I was the appellant, and one would think if someone wanted to disqualify Justice Boyle it would be me because I was trying to overturn Judge Boyle. My opponent, for reasons that still escape me, moved to disqualify Justice Boyle. And although she fairly regularly did disqualify, I opposed it saying you know we don't want a 3/3 Court and she did not disqualify. And she was either in the majority or actually wrote the opinion in the case that I lost. So I am one that believes we are a little too quick to disqualify particularly in a court of last resort on those kinds of issues.

**JUSTICE YOUNG:** Well, let me then direct you to the subsection (7) that you would like to add to alternate A - "Other like circumstances where an objective person would have substantial doubt as to impartiality of a Justice." I don't really know how to operationalize that because I think that's an appearance of impropriety standard. And what we have for good or ill in this state for the last decade has been a very substantial and I think healthy public debate about judicial philosophy. Some people have taken exception to mine and some have supported it, but there are those who have argued that because they have opposed me I should be disqualified. Now I'm not sure how to

operationalize what an objective person believes about any number of circumstances that sort of get into the mix of the polity of judicial politics at the Supreme Court level. Help me understand how we make this objective person cut when the outcome can literally be on this Court the change of the judicial philosophical majority from one position to another in a particular case.

**MR. BAUGHMAN:** And I guess at the end all I can say is I don't think you can create a rule that specifies every circumstance –

**JUSTICE YOUNG:** I understand.

**MR. BAUGHMAN:** so you need something that sweeps a little more broadly. The federal rule is even broader. It is a reasonable person can question the impartiality. I think it should be more narrow than that – an objective person would have substantial doubt. There's a reason it was drafted that way to make it a little tighter. But those are all – you're right, those are terms of art that are going to have to be looked at in every case, and they are terms that are – would mean a different thing in a legal system than to an ordinary person. We heard there was a survey that people would say if you gave over $50,000 that the judge or justice would not be impartial. I'm sure that if you told the ordinary citizen who is not a lawyer if a judge sat in the Court of Appeals on a case and wrote the opinion on an issue and the issue later came before the Court in a different case and that issue is before the Court should that – would that affect impartiality. And I am confident if you had a poll they'd say yes, and that judge should disqualify. That's not the case in any place I know of in the country in the legal system nor should it be so.

**JUSTICE YOUNG:** Why isn't that an objective measure than of what a reasonable person would believe?

**MR. BAUGHMAN:** Well, I guess you'd have to say it's a measure of what matters in the legal community, and then you should put that in there. Look at how it's interpreted in the federal system where they have what I believe is a looser standard – a reasonable person could question the impartiality. They don't need to disqualify in that circumstance. They wouldn't disqualify in a lot of circumstances where if you would just ask the man off the street is that – because impartiality means I'm biased to this case – to this person – not I have, as you've indicated, a legal philosophy. You know well of course you want to support people who have a legal philosophy in a general sense, at least you hope that, that you support and believe that is what should be on the court. That doesn't mean that if I didn't have a case before that person they should be disqualified. And if you went to a different system, if you had an appointive system, do I have to – you know I might support somebody who had championed the person who makes the appointment not only disqualified because I supported the senator who supported the person to the governor who appointed the person who's now hearing my case. That's not avoidable.

**JUSTICE YOUNG:** Could you speak to the review issue, and the thing that distinguishes proposal A from the other two is that the disqualification decision of the targeted Justice is left with the Justice subject to review by the United States Supreme Court. The other two have mechanisms for appellant review within – short of the United States Supreme Court. One of which has the proposal that the Chief Justice of the Court review the targeted Justice's disqualification system. I asked the counsel for the State Bar what was the constitutional authority of anybody, assuming that this Court has the authority to remove a judge – a Justice in a particular case, what is the authority of the Chief Justice even if delegated that authority by court rule to remove an elected Justice?

**MR. BAUGHMAN:** As I – two points. First - because I want to separate my first and second letter - the first letter Justice Boyle joined and I can absolutely say we discussed it in detail that I believe, she believes, that having anyone other than the challenged Justice make the decision is a mistake as a matter of policy.

**JUSTICE YOUNG:** Is it just a policy question?

**MR. BAUGHMAN:** As a policy matter. And as to my second point which relates to my second letter on *Caperton*, one of the points I made at the outset in that letter is I question whether the Court as an entity, the chief judge, the other six – the Chief Justice – have the authority to oust the Justice from a case. I suspect – and obviously I don't know – I suspect that's why the procedure that has always obtained in the United States Supreme Court from its beginning of its existence that that is what happens there – the challenged Justice makes the decision – I suspect the reason they do it that way is because there's at least some belief or understanding that it has to be that way. The rest of the Court doesn't have the authority to throw a Justice off the case. And I think that's – if there is authority to do that, I don't know where it comes from.

**JUSTICE CORRIGAN:** Have you read Solicitor General Restuccia's letter to us citing the Michigan constitutional provision –

**MR. BAUGHMAN:** Yeah, I read it –

**JUSTICE CORRIGAN:** and the lack of power in this Court to remove a Justice –

**MR. BAUGHMAN:** Yes –

**JUSTICE CORRIGAN:** or judge?

**MR. BAUGHMAN:** I ready that yesterday. I got a copy of his letter yesterday and I –

**JUSTICE CORRIGAN:** And do you concur with what he had to say on that subject or -

**MR. BAUGHMAN:** Yeah, I read it quickly, I hate to say it, but I generally do. I know we have talked about it and I know that the Solicitor and I share the view that that would be a mistake. I told him at the outset that I was glad he was after me because any question I got I was just gonna say the Solicitor General's gonna address that. But -

**JUSTICE MARKMAN:** Mr. Baughman?

**MR. BAUGHMAN:** Yes.

**JUSTICE MARKMAN:** Do you think any of the proposals that are pending before this Court now would have any impact one way or the other on the sheer number or volume of disqualification motions?

**MR. BAUGHMAN:** My belief is that a – particularly a system that puts review in the hands of either the other Justices or the Chief Justice would increase the volume I think dramatically because it would lead to a kind of political gamesmanship of there's – I anticipate from the decisions the Justices have made in other cases that maybe these four are for me and these three against or maybe that's the likelihood or it's 3/3 and I don't know about this one, and there have been campaigns in this state because we have an elected judiciary I will try to disqualify these two and then that will remove what might be a four Justice majority against me to a three Justice majority for me. I think you're gonna see that kind of thing. And it will go beyond that. I can move to disqualify the Justices who are hearing the disqualification.

**CHIEF JUSTICE KELLY:** Excuse me. Any change – major change in the law and this in affect would be a major change in the law were we to – were we to adopt such an appeal process. We'll inevitably engender some litigation to sort out and clarify for the legal community in particular what exactly the impact of that change will be. It's my experience that that's inevitable in any major change. Why should we be deterred from considering it merely because there might be a period of litigation to clarify and stabilize that?

**MR. BAUGHMAN:** Well, and I guess the Court would have to decide for itself, but I tend to believe that that sort of a system is damaging and destructive to the Court itself where other Justices sit on the authority of Justices to sit on a case. Justices may disqualify Justices for reasons that the disqualified Justice believes is absolutely wrong, it will change the – it may change the outcome of cases because of that, and as I said I could as a party say that – say three Justices are challenged and there's four left, I could as a party say I challenge two of the Justices who were sitting on the disqualification

motion to hear the disqualification motion because of things they've said about the other Justices in the campaign. So you keep ratcheting that up. You may be disqualified from sitting on a disqualification. You may – you could easily get down to not having a majority of the quorum to even sit on the motion.

**CHIEF JUSTICE KELLY:** Well, you're assuming you can't replace the disqualified Justice with another person.

**MR. BAUGHMAN:** I'm sorry – do I think it's possible to do that?

**CHIEF JUSTICE KELLY:** No, I say you're assuming in what you're arguing here –

**MR. BAUGHMAN:** That's correct. None of the proposals suggest that.

**CHIEF JUSTICE KELLY:** That's true.

**MR. BAUGHMAN:** That's true.

**CHIEF JUSTICE KELLY:** But clearly changes and additions could be made were the Court to adopt A, B, or C – as time went by changes could be made to accommodate for obvious needs right?

**MR. BAUGHMAN:** They could be although I think they would require a constitutional amendment to do so. I am of the view that the Court does not have the authority to add a Justice to sit in the place of a disqualified Justice. A recused Justice is not –

**JUSTICE WEAVER:** That doesn't make it so just because you believe it right?

**MR. BAUGHMAN:** That's correct. Of course it's not so because I believe it, but –

**JUSTICE WEAVER:** (inaudible) appreciate that.

**MR. BAUGHMAN:** I'm here to give my opinion, and my opinion is there are seven Justices - a disqualified Justice does not cease to be a Justice even for that case. They are simply not participating. If you took the other view, there would be nothing to stop this Court if the constitutional provision about appointing retired Justices applies in this circumstances, or other judges to sit, you could simply say you know we've got a backlog of applications, we're appointing seven people to sit and go through those. Or we've got a lot of cases for oral argument, we're gonna appoint seven other people to hear

those, because there's no limitation other than for a limited period in that provision. I don't think that's what it was aimed to do.

**JUSTICE WEAVER:** It's for a limited period or a specific case (inaudible).

**MR. BAUGHMAN:** No specific period time of I think and specific duties. And you could say here's a hundred applications we want you to review those and pass on them.

**JUSTICE WEAVER:** Well, we wouldn't have to appoint seven, maybe two, if we had a Justice missing technically just as we do when – at the trial courts or the Court of Appeals somebody else can be appointed to sit. For that period - limited period or for that specific case. In this case we're talking about specific cases. Whether we should or not is another issue. Whether we have the power if you read the Constitution carefully and I assume you have and I have too and you're there and I'm here.

**MR. BAUGHMAN:** Exactly as your honor said –

**JUSTICE YOUNG:** Fortunately she's not here alone.

**MR. BAUGHMAN:** Because I say it doesn't make it so and it takes a majority of the Court to decide anything. I suggest – I'm here to express my opinion – that the Court doesn't have the authority through a rule to oust a Justice from a case that if it did have the authority to oust a Justice from a case it wouldn't have the authority to replace that Justice. And if that system is going to be adopted we ought to have the people involved and amend our Constitution to so allow. Until then I think the system we've had has worked. There aren't – I don't think there is a problem that we're addressing here with the notion that we need someone to review the individual Justice who is acting according to his or her oath in making the decision whether or not they should sit. There's nothing broken about the system that currently exists that needs to be fixed. In that regard, I have no problem with making it clear that here is a specific rule that that individual Justice is applying and the circumstances that Justice is suppose to apply. But I think it needs to be left to that Justice as it always has been here and it always has been –

**JUSTICE WEAVER:** So Mr. Baughman.

**MR. BAUGHMAN:** in the United States Supreme Court.

**JUSTICE WEAVER:** Excuse me, but putting aside the issue about whether the Justices can oust – can have somebody disqualified is what it really is and somebody could replace them – putting aside that but you've made it very clear how you feel about that, but do you see a need to have a written rule as opposed to some supposedly existing

long – nonwritten rule – so it is clear with respect to the Justices. Do you have any problem with that?

**MR. BAUGHMAN:** I think adopting one of the alternatives although of course I have a preference to one is a good thing.

**JUSTICE WEAVER:** Which one you –

**MR. BAUGHMAN:** That would be a good thing to have.

**JUSTICE WEAVER:** So you think that would be a good thing.

**MR. BAUGHMAN:** I think it would be a good thing.

**JUSTICE WEAVER:** Because that's very important, we shouldn't get lost in one issue.

**MR. BAUGHMAN:** No, I think it would be – it was not my position in the letter that all alternatives should be rejected. I think alternative A with some tweaking is the one that I think should be adopted and would be fine.

**JUSTICE CAVANAGH:** Mr. Baughman what do you think was the motivation for the adoption of the current rule?

**MR. BAUGHMAN:** Of 2.003?

**JUSTICE CAVANAGH:** Yeah. Do you think it had due process concerns?

**MR. BAUGHMAN:** It could have. There was a predecessor rule I know from – in the previous rules that was similar to 2.003. That didn't – that wasn't the first disqualification rule.

**JUSTICE CAVANAGH:** As I was thinking about this and comparing our historic procedure with that rule, I was wondering whether we – this Court would have the authority to abolish that rule – to wipe it out and say that at the trial court level you file your motion to disqualify the judge, he or she makes the call, end of the game, you can't appeal that.

**MR. BAUGHMAN:** I think you could do that if you – I mean we're not talking about sound policy now – you could do that and you could say then the only ground for disqualification is a violation of due process if you wanted to. I mean the rule – the current rule certainly goes beyond any requirements of due process. If you wanted to say the Constitution's not part of it, if you're not disqualified and you're not subject to review,

then the only review that would be available is when you got to federal court because the constitutional review would still exist. You could do that if you wanted to, I don't – I certainly don't advocate that.

**JUSTICE WEAVER:** Why is it – that's what he's saying why is it constitutional to be able to disqualify a trial judge they've been elected et cetera under the Constitution? What's your theory on that?

**MR. BAUGHMAN:** It's a – because it's a hierarchical system, and I think that this Court can impose rules that allow a superior court to disqualify, recuse, a judge in a lower court and appoint a first among equals – the chief judge – to review that judge's decision if the judge denies that. I think that's simply the nature of a hierarchical court system. But when you get to the top there's nobody looking down that can tell you what to do and I think you're all – there you're all equals and you have to make your own calls on the question.

**JUSTICE YOUNG:** Well, there is the Supreme Court of the United States that gets to review these decisions.

**MR. BAUGHMAN:** Yes, only on the constitutional questions. There are circumstances under the rule that exist and the proposed rule that would control this Court where if you did not disqualify in violation of the rule you would not be violating due process, and the Supreme Court would have nothing to say about it. I suspect she'll never see another *Caperton* in the United States Supreme Court again.

**JUSTICE YOUNG:** Not in the Supreme Court, but you see lots of it –

**MR. BAUGHMAN:** You're gonna see a lot of *Caperton* issues raised, but again I think those facts there are truly unique.

**JUSTICE MARKMAN:** Mr. Baughman in several recent cases involving motions for disqualification we've had Justices of this Court who've said something along the following lines. "I have no personal bias or prejudice for or against any party in this matter." Is that an – is that relevant, and if so how under *Caperton*?

**MR. BAUGHMAN:** Well, I think it's relevant in that if you did have a personal bias you should be disqualified. That you don't have a personal bias, under *Caperton* anyway, is not the end of the question apparently. That wasn't clear I don't think until *Caperton*. *Caperton* says you have to have objective standards. So I think one would have to say I do not have any personal bias against the party and by the objective measures that exist that we've adopted that – or some objective measures – I am not disqualified under any of those. I think as I tried to say in my second letter, *Caperton* is not about decision makers it's about the standards and it requires some objective

measures not leaving it solely to I personally am going to tell you I am not personally biased. If there is an objective measure that says well you can say that but you are related within the third degree of consanguinity to a party and therefore you're out.

**JUSTICE MARKMAN:** Given that we're looking at this through an objective prism, what is the point of even having the individual Justice who sought to be recused make a decision in the first instance? Obviously, if he or she says "I am biased" that would be the end of the matter. But what is the purpose of that Justice even having the first crack at things?

**MR. BAUGHMAN:** The only reason I can think of is that – and I think this is true in the lower courts – is because some record is then made when it goes to the next level. In other words, the judge responds and she's kind of an odd circumstance disqualification motions are because the judge is in a sense both the decision maker and to some degree an unsworn witness because the judge can say now you say I was at a party with so and so, no I wasn't, or it was a graduation party and I don't know so and so, so the judge is putting facts on the record and then concluding and therefore I am not biased personally and I'm not disqualified under the rule. And then the next judge, when we're dealing with like the circuit court system, the next judge has that record to look at.

**JUSTICE MARKMAN:** Well, moreover if we are going to have objective test, what is the propriety of the provision in one of the proposals, I think it's alternative C, that the parties themselves can waive the – that situation. The parties can waive any objection if they choose to do so. How can we have an objective standard waived by the parties where the Justice himself can't overcome that objective standard?

**MR. BAUGHMAN:** Well, probably there'd be nothing unconstitutional about doing so, but I would not be in favor of such a system. I think that would be a mistake.

**CHIEF JUSTICE KELLY:** Mr. Baughman let's assume we adopt A and with the addition that you I think wisely proposed, let's say that a case comes before the Court and my husband is the litigant and I'm asked to recuse myself because it's a violation then of the rule, and I refuse to recuse myself. Now who has the authority to require me to recuse myself?

**MR. BAUGHMAN:** I don't think anybody does.

**CHIEF JUSTICE KELLY:** Well, then what is the use of the rule?

**MR. BAUGHMAN:** Well, as your honor indicated earlier, have I ever seen any Justices who are recusing themselves because they don't like attorneys. I don't think you can craft a rule to deal with impossible situations. As you said, you don't have the perfect

to be the enemy of the good. I can't imagine any Justice here would be - in the face of a clear provision of the rule would refuse to disqualify.

**CHIEF JUSTICE KELLY:** But with respect to your additional point, the one dealing with appearance of impropriety, it becomes much more subjective – difficult.

**MR. BAUGHMAN:** It does and I –

**CHIEF JUSTICE KELLY:** And there's a case where a Justice easily could say I believe objectively, as the Chief Justice now did in *Caperton*, that I'm not biased, and everyone else would say objectively you clearly are. No one could take that Justice off.

**MR. BAUGHMAN:** Only if that Justice's participation is viewed under *Caperton's* standard as violating the Constitution, then a federal reviewing court could, but nobody on the Court could. I mean it could be the Justices who were saying we objectively believe you are are wrong, and they are ousting a Justice who is correct. In the end, I think you leave that to the individual Justice and the – their good faith following of their oath under objective rules understanding – and I understand Justice Young's concern that my proposal of (7) does leave that you know subjective what does that mean room, but I don't how you have a rule that doesn't have some kind of a catchall. Unless you try to enumerate every possible circumstance I don't see how you do that.

**JUSTICE YOUNG:** Why not simply say constitutionally required?

**MR. BAUGHMAN:** One could do that – you could say – one could say or is otherwise required by due process.

**JUSTICE YOUNG:** Yes.

**MR. BAUGHMAN:** That could be – that could be a substitute. Because my point in putting it is was – as I – I think I indicated at the outset, I didn't see how A would catch *Caperton*. If you put "is otherwise required by due process" that would catch *Caperton*, because *Caperton* is a due process case. Thank you very much for your attention.

**CHIEF JUSTICE KELLY:** Thank you sir. We have one final speaker and that's our Solicitor General for the state, Eric Restuccia. Good morning sir.

**MR. RESTUCCIA:** Good morning. May it please the Court. Eric Restuccia, Michigan Solicitor General. The only issue that I wish to comment on is the question whether the decision of an individual Justice regarding disqualification should be subject to review by the rest of the Court. Because the Michigan Constitution contemplates a court of seven elected Justices, I recommend that this Court retain its current rule with

respect. That is that the decision regarding recusal of an individual Justice should not be reviewed by the remainder of the Court. This Court should follow the rule of recusal as applied by the United States Supreme Court.

**CHIEF JUSTICE KELLY:** So you're recommending we follow the current unwritten rules.

**MR. RESTUCCIA:** Well, no. I'm not really taking a position with respect to A, B, or C and its content because B or C obviously could be revised to eliminate an appeal process. I do think it wise that there be a written policy, a codification of the current rule, and whether there are changes from A, B, or C, I'm not taking a position with respect to that. I'm only really addressing this – this one issue because I think it touches really on the nature of the Court as a seven-member body. Because I see that's the paramount value here is the Court as an institution and as created by the Michigan Constitution it's a seven-member Court. And the authority that's been entrusted to you being the final word on Michigan law is entrusted to you as a group of seven not to you as individual Justices and you speak as a Court. And I know – the decision in *Caperton* doesn't change that. The *Caperton* case didn't address who would decide these questions; it relies on the standards on the question of what could be a due process violation. And the Michigan Constitution doesn't provide the authority for this Court to determine its internal membership, and it – I think make no mistake the decision on the question of who may sit or the question of disqualification really is the question of who is the membership for the Court on that particular case. So I think the decision should be left to the individual Justice.

**JUSTICE YOUNG:** You're suggesting that your taking no position on which of the three proposals is superior, but your legal position, your constitutional position, it seems to me is inconsistent with two of the three proposals.

**MR. RESTUCCIA:** Oh, what I said is – I'm sorry, let me clarify. I think if B – if alternative B eliminated that aspect, I mean there's additional different language in B, but if it eliminated the appeal process and if C eliminated its appeal process, obviously B applies to the Chief Justice and C to the majority of the Court, then I'm not taking a position with respect to how the language should be of what the standard should be for the analysis of the individual Justice.

**JUSTICE CORRIGAN:** Mr. Restuccia if *Caperton*'s controlling on construing the Due Process Clause of the United States Constitution, then does that not trump the Michigan constitutional provision? And if we have a true *Caperton* due process problem, why should not the other Justices get to vote on a *Caperton*-type issue in order to prevent the only Court – in order to prevent the U.S. Supreme Court having to be involved in everything?

**MR. RESTUCCIA:** Well, *Caperton* – and I think that's one of the key points is that *Caperton* obviously does – and that's United States Supreme Court law it does trump Michigan constitutional law, but *Caperton* didn't answer the question of who is the reviewing body. And I –

**JUSTICE CORRIGAN:** No it doesn't. We're trying to figure out what is the answer, and must one – if we had – let's say we had the situation here as in *Caperton* and that was in front of us, all of us then are powerless to step in and prevent the constitutional due process deprivation from occurring because the Michigan Constitution in your view would preclude that.

**MR. RESTUCCIA:** I think that's right. I think that's right, and in (inaudible).

**JUSTICE CORRIGAN:** But do I not enjoy some greater power to protect the Constitution of the United States Due Process Clause in that sense?

**MR. RESTUCCIA:** Meaning inherent to that – there's an implied authority for the Court then to create mechanisms –

**JUSTICE YOUNG:** It's not implied authority; we have the coequal authority under the federal Constitution to apply the Constitution – U.S. Constitution in our cases.

**MR. RESTUCCIA:** Oh, I think that's right, but then the suggestion is whether it's from the case or from the Due Process Clause itself. It's the Due Process Clause that implies the authority of the Court to diminish its membership or expand its membership because of considerations of *Caperton*. Well, I think what's notable about the way the United States Supreme Court reviewed this – I mean if you looked at the West Virginia case which had the same policy they didn't say that one of the reasons for the due process violation was because of their lack of review, in fact it was the misapplication of the rule by an individual justice. In response to Justice Markman's question –

**JUSTICE CORRIGAN:** Well, was that even briefed I don't know.

**MR. RESTUCCIA:** Well, one of the questions asked – in fact if you look through Justice Roberts 40 questions, question 19 says "if there is a review of appellate process whether that appellate process would foreclose review." In other words, his question assumed the fact that there was no requirement for an appellate process. So I think *Caperton* – you read *Caperton* it does not require and it does not provide for an appellate process. And, in fact, if it did then that process would have to be applied in the United States Supreme Court itself.

**JUSTICE CORRIGAN:** Correct, and maybe that's why they didn't go there.

**MR. RESTUCCIA:** I think that because it seems to me it touches on them. And I think Justice Kelly you make the good point that there could be a harm – a due process violation could occur. But the question is - it seems to me the paramount value here is the Court as a seven – as a group of seven. And once this idea that you know this is kind of inverted pyramid of one, three, seven to come to the seven Justices – but if the seven Justices then can internally create a new body within well it's no longer the seven it's now either the one or the four who have the real authority for who constitutes the Court.

**JUSTICE WEAVER:** (inaudible) when Justices go by themselves you reduce it to six.

**MR. RESTUCCIA:** But I think that's – that's kind of the –

**JUSTICE WEAVER:** I agree with you that that shouldn't happen (inaudible) –

**MR. RESTUCCIA:** Well, the due process –

**JUSTICE WEAVER:** I think there always should be seven on the order.

**MR. RESTUCCIA:** Well, I guess –

**JUSTICE WEAVER:** So if a Justice says I am going to disqualify yourself it's just as Justice Boyle by the way did very regularly with respect to her husband being a – any of those cases out of Wayne County that he was involved in she disqualified herself all the time.

**MR. RESTUCCIA:** Well –

**JUSTICE WEAVER:** Well, almost all the time because I was here for – well as long as – I don't know when she left, but (inaudible) – 3 or 4 years, I was here long enough. So the fact of the matter is is if under your theory won't there always be seven –

**MR. RESTUCCIA:** Well, I guess –

**JUSTICE WEAVER:** and then how can you let a judge disqualify themselves. I mean you're talking about sure it is a one court of justice with seven Justices and theoretically it's one court of justice because we do take trial judges and appoint them on occasion to the Court of Appeals, we've taken Court of Appeals judges and appointed them to the trial judges. We appoint trial judges throughout under the entire art 21. The last sentence which talks in terms of anyone who has been elected and served, either retired or not, can be appointed for a specific purpose or for a limited period of time to another court. And it says judge. The first sentence gives the governor the power to appoint any judge. That's how the judge gets to appoint Justices to the Supreme Court.

So one has to look at it all. Your argument that's it always seven then nobody should ever be able to get off. That doesn't make good sense. You know it's occasionally nice to think about these things with some good sense as opposed to seeing how technical lawyers can get about their opinions. So if you would answer for me that it's all right for the judge – if the judge decides to disqualify themselves then you can have six. But everywhere else the same thing from Mr. Baughman and I really don't know what Justice Boyle you know when he was speaking for her or when he wasn't. So Justice Boyle's issue here other than the fact that she certainly disqualified herself a lot of times.

**MR. RESTUCCIA:** Well, I – I see your point. I think that this Court should take its guidance from the way that the United States Supreme Court has drawn this balance. You each have taken an oath and obviously you can't violate the oath by violating the due process if you knew you were personally biased. I think that's right. So that's the point at which I think due process does (inaudible). I think you're right. But I think to create a process by which then the seven Justices are conferring authority onto a body within I think is essentially like removing that Justice –

**JUSTICE WEAVER:** (Inaudible).

**MR. RESTUCCIA:** Well, it seems to me that what you're essentially doing is creating a body within and then removing a judge from a particular case.

**JUSTICE WEAVER:** Well, it's been interesting and I want to think it through. I appreciate it –

**MR. RESTUCCIA:** Let me make one –

**JUSTICE WEAVER:** and I gather you gave us – recently submitted your opinion because it may have been sent to us yesterday. So I didn't even know you were on the list to speak as a matter of fact. So you are a late comer to it and I didn't have a chance to look at your (inaudible).

**MR. RESTUCCIA:** No, I understand.

**JUSTICE MARKMAN:** Mr. Restuccia can you tell me briefly what you think about the proposal that Ms. Donath and Mr. Robinson suggested that is the affidavits?

**MR. RESTUCCIA:** I have not come prepared to talk about really areas outside of that. I don't want to weigh in. I do want to make one further point that's not legal in nature because I knew in a way that the Court – that there's some already drawn – perhaps the Court has inclined certain conclusions were under legal analysis. But there is I think also a prudential aspect to this and I just want to make a brief comment about collegiality that – because I served for Dorothy Comstock Riley for her last two years on

the Court in the mid-1990s. And during that time I thought there was a robust exchange of ideas and that the Court really enjoyed the kind of exchange of ideas, but I thought there was also kind of a fraternal collegiality. And that I fear that if – well if the two – alternative B or C which allows for the review by the rest of the Court that what's gonna be in the past has been a rare instance. The motion for recusal will then become a routine motion, and that this Court's not ultimately gonna be well served by that because ultimately we want the best Justice possible on - and in my view this Court operates best when it operates with all of its Justices – all seven.

**CHIEF JUSTICE KELLY:** Thank you sir. That concludes our public hearing.